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In the Supreme Court of the United States

OCTOBER TERM, 1967

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BATA SHOE CO., INC., AND UNITED SHOE WORKERS OF AMERICA, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH [redacted] CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on April 6, 1967.

OPINIONS BELOW

The opinion of the court of appeals (Appendix B, *infra*, pp. 23–49) is not yet officially reported. The Board's decision and order (J.A. 1–21)[1] are reported at 157 NLRB 1.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1967 (Appendix B, *infra*, pp. 49–50). On July 6, 1967, Mr. Justice Brennan extended the time for

[1] "J.A." refers to the joint appendix in the court below; copies have been filed with the petition.

filing a petition for a writ of certiorari to and including August 4, 1967. This Court has jurisdiction under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)).

QUESTION PRESENTED

Whether the court below applied the wrong standard of judicial review in reversing the Board's determination that a representation election was held by the Board under circumstances which enabled the employees to make a free choice of representatives, and afforded all eligible voters adequate opportunity to vote.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix A, *infra*, pp. 20–22.

STATEMENT

A. THE BOARD'S DECISION AND ORDER

1. *The representation proceeding.*—On March 9, 196[illegible], after the Union [2] filed a petition for representation with the Board, the respondent Company and the Union entered into an election agreement. This agreement, approved by the Board's Regional Director, provided for an election to be held on April 23, to determine whether the production and maintenance employees at the Company's Belcamp, Maryland, plants wanted the Union to be their bargaining representative (J.A. 3–4; 126–129).

During the subsequent pre-election period, both the Company and the Union vigorously stated their posi-

[2] United Shoe Workers of America, AFL–CIO.

tions in campaign leaflets distributed to the employees. On April 22, the day before the election, the Union distributed a leaflet, in the form of an open letter to Company President Dolezal, which stated in part (J.A. 125c–125e):

> WHY NOT BE FAIR AND GIVE THE WORKERS THE TRUE FACTS, MR. DOLEZAL
>
> You have been making many speeches about Union benefits in every department of the plant, but you have never produced one shred of evidence to prove what you say. When the worker asks to see the proof, you ask them to come to your office and you will show it to them—SO FAR NOTHING BUT SPEECHES.
>
> In your New York union contracts which your Attorneys Seligman and Seligman participated for some of the shoe companies, the following benefits are in effect:

Union benefits	Bata
Hospital Room and Board—$30.00 per day.	$17.00 per day.
Dependents—Coverage for dependents paid for entirely by the Company. The worker pays nothing.	Employees of Bata contribute for dependency coverage.
Clinic—For all union members and dependents: Includes free diagnosis—free doctor—free drugs—free X-ray, etc.	Bata has no such clinic, and in fact punishes workers who are out sick.
Eye Glasses—Union members and dependents receive free eye glasses and examination.	Bata has no such thing.
Pension Plan—Ours has been in effect many years with a vesting provision at age 55 and 25 years of Service. The Union Pension Plan is administered by a Board of Trustees on which both the Employer and the Union have equal voting powers.	Bata is the sole administrator and the formula can be changed when they feel like it, plus the older worker when coming close to retirement has undue pressure exerted upon him so he will be forced to leave by the time he is ready for retirement.
Wages—Wage Increases and better benefits for all employees and a qualified Union Representative to handle your grievances.	No general Wage Increases for their workers in spite of their PROFITS. Bata Personnel man handles grievances to the Company's satisfaction.

THEREFORE, MR. DOLEZAL, SINCE YOUR HIGH PRICED ATTORNEYS, SELIGMAN AND SELIGMAN, HAVE THESE NEW YORK UNION AGREEMENTS, WHY NOT BE FAIR AND SHOW THEM TO THE BATA WORKERS?

The election was held as scheduled on April 23, and the Union won, 1082 to 1036 (J.A. 4; 65).[3] The Company filed objections to the election, contending (1) that the April 22 leaflet circulated by the Union misrepresented material facts which "coerced and intimidated the employees and so lowered campaign standards that the uninhibited desires of the employees could not be determined" (J.A. 67), and (2) that the Board improperly conducted the election so that "eligible employees were deterred and prevented from voting [and] ineligible employees were permitted to vote" (J.A. 104).[4] Pursuant to the Board's Rules and Regulations (29 C.F.R. § 102.69(c)), the Board's Regional Director investigated the Company's objections and issued a report thereon, finding as follows (J.A. 65–125):

(a) The Regional Director found that with one exception, all the benefits referred to in the leaflet were included in an existing contract between the Union

[3] Forty-one ballots were challenged but their validity was not determined since they could not have affected the results of the election (J.A. 65).

[4] The Company raised numerous other objections to the election, and to conduct affecting the results of the election; but the court of appeals agreed with the Board that those objections were insufficient to invalidate the election (App. B., *infra*, pp. 33–37).

and a New York shoe company, Andrew Geller, Inc.[5] The one exception was that the Geller contract did not provide free clinic services "for all union members and dependents" as asserted in the leaflet; it provided free clinic services for union members and allowed a 50 percent reduction in the normal fee for dependents (J.A. 73). That contract also provided free "surgery or other operative procedure" for both union members and dependents (J.A. 73). The Regional Director concluded that the assertions in the leaflet were substantially correct, and were not inaccurate in "any material respect" (J.A. 73–74). Accordingly, he rejected the Company's contention that the leaflet so misrepresented material facts that "the uninhibited desires of the employees could not be determined" (J.A. 67, 73–74).

(b) Respecting the conduct of the election, the Regional Director's investigation disclosed that a large number of employees were still in line to vote when the polls were scheduled to close at 5:15 p.m.[6] Shortly before that time, the Board agent had an announcement made over the plant public address system that all eligible voters must be in the voting line by 5:15 in

[5] The Regional Director noted, however, that another current contract in the New York area "did not reflect all the benefits" claimed by the Union (J.A. 72).

[6] The long line was caused by delays in balloting. These delays were largely due to the difficulty in locating the names of the voters on eligibility lists prepared by the Company for use in the election. The Company compiled these lists by departments as of the stipulated eligibility date, but did not correct the lists after a substantial number of employees were subsequently transferred to other departments (J.A. 106–107).

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order to vote. At 5:15, the voting line was so long the agent could not keep it under observation, since he had to be in the polling area. Therefore, he instructed the last three employees in line to inform any employees who subsequently arrived that the line was closed, and to direct them to him in the polling area (J.A. 113). Later, the agent excluded one employee he observed entering the line after 5:15,[7] but 30 other employees entered the line unobserved by the agent or unchallenged by the employees instructed to guard the line (J.A. 113–114). No evidence was presented, and none was discovered in the Regional Director's investigation, that any eligible employee, other than the one mentioned above, was turned away by the Board agents or the employees at the end of the line (J.A. 114). Ninety percent of the eligible voters reporting for work on election day actually voted (J.A. 124).

On the basis of these facts, the Regional Director rejected the Company's contention that eligible voters were deterred from exercising their franchise (J.A. 124). Further, he found no merit to the contention that those voters getting into line after 5:15 were ineligible to vote, concluding (J.A. 124):

Moreover, the lists, which included 2,583 names of employees eligible to vote, were only partially alphabetized. In addition, some Company foremen sent newly hired employees to vote even though they were not on the eligibility lists and could not vote, necessitating a fruitless search of the eligibility lists for their names. Also, rain forced employees to seek shelter together, thus mixing department groups which had been released separately to vote (J.A. 106–111). The Regional Director concluded that the Company, and not the Board, was largely responsible for the delayed balloting (J.A. 111).

[7] The Regional Director's investigation revealed that the excluded employee actually had properly been in line and was

> The fact that otherwise eligible employees appear to vote after the scheduled closing of the polls does not make them ineligible. The Board's mandate is to provide employees with an opportunity to vote. While reasonableness requires that polling periods be specified, the fact that eligible employees succeeded in casting ballots after the line was closed in this case but before the polls were closed is not ground for setting aside the election.

The Regional Director recommended that the Company's objections to the election be overruled and that the Union be certified as the bargaining representative of the employees in the unit (J.A. 125). The Company filed timely exceptions to the Regional Director's report (J.A. 131–172). On August 25, 1965, *the Board*, after consideration of the Regional Director's report and the exceptions thereto, issued its Decision and Certification of Representative, adopting the Regional Director's recommendations in full (J.A. 4).

2. *The unfair labor practice proceeding.*—The Union requested the Company to bargain, but the Company refused to do so until there had been court review of the certification (J.A. 4; 125x). The Union filed unfair labor practice charges, a complaint issued, and a hearing was held thereon (J.A. 2). At the hearing, the parties stipulated that the Company had no production employees in New York and no contract with

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returning from the rest room when the Board agent saw him (J.A. 114–116). Although that employee should thus have been allowed to vote, the Regional Director found that his exclusion was insufficient to affect the results of the election and hence did not warrant setting aside the election (J.A. 116).

the Union there (J.A. 9; 46–47).[8] The Company argued that these stipulated facts, which were not reflected in the Regional Director's Report on Objections, established that the April 22 leaflet (*supra*, pp. 3–4) misrepresented to the employees that the Company had contracts with the Union in New York containing the benefits described. It asserted that the misrepresentation was material, and that, since it had no opportunity to reply, the election should be set aside (J.A. 10).

The Board, adopting the trial examiner's decision (J.A. 1), found that the reference in the leaflet to

[8] This and other evidence was permitted to be introduced at the unfair labor practice hearing although the Board generally precludes relitigation in an unfair labor practice proceeding of issues determined in the representation proceeding. See, *e.g.*, *National Labor Relations Board* v. *Worcester Woolen Mills Corp.*, 170 F. 2d 13, 16 (C.A. 1), certiorari denied, 336 U.S. 903; *National Labor Relations Board* v. *Southern Airways Co.*, 290 F. 2d 519, 522 (C.A. 5); *National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199, 204 (C.A. 7). The general rule was relaxed here under the following circumstances: Counsel for the General Counsel advised the Company prior to the unfair labor practices hearing that he would not object to the litigation of issues raised in the representation proceeding (J.A. 5). The Company thereupon filed with the Board a Motion for Reconsideration in the representation case; the Board denied the motion but authorized the Company to present these issues to the Examiner at the unfair labor practice hearing (J.A. 5–6; 175). However, the Company introduced virtually no evidence at the hearing, other than the stipulations noted above (J.A. 7).

The Company argued in the court of appeals that it had been denied due process because the Board failed to grant a hearing on its objections to the election in the representation proceeding. The court (with Judge Bryan dissenting) rejected the contention, finding that any defect in this regard was cured since "a sufficient hearing was accorded the Company in the Section 8(a)(5) proceeding" (App. B, *infra*, pp. 25–32).

"your New York union contracts which your Attorneys Seligman and Seligman participated for some of the shoe companies" was ambiguous, at most, as "your" referred to both employees and employer in different places in the leaflet (J.A. 10). The Board further found that the subsequent phrase "for some of the shoe companies" dispelled any ambiguity by demonstrating that the reference was not to a New York contract with the Company (J.A. 10–11). Moreover, the Board noted that the remainder of the leaflet contrasted "Union Benefits" and "Bata" benefits, and nothing therein indicated that the "Union Benefits" applied to any employees of Bata (J.A. 11). Accordingly, the Board concluded that the reference to "your union contracts" was at worst "inartistically or vaguely worded and subject to different interpretations," and was insufficient "to establish a misrepresentation" as to the existence of contracts with the Union in New York (J.A. 11). The Board therefore affirmed its decision in the representation case that the Company's objections provided no basis for setting aside the election;[9] held that the Company's refusal

[9] In the unfair labor practice proceeding, the Company also sought, without presenting new evidence, to reargue its other objections to the election which had been considered and rejected by the Board (J.A. 4–17). The Board declined to reconsider these objections in the absence of new evidence (J.A. 11). In addition, the Company introduced into evidence a pre-election agreement between the Company and the Union, which limited the number of election observers to three for each party. The Company contended that the Board conducted the election contrary to this agreement when the Board agent appointed three voters to guard the end of the voting line (J.A. 14–15). The Board concluded that these three voters were not "observers for any party" and rejected the contention (J.A. 16).

to bargain with the duly certified Union violated Section 8(a) (5) and (1) of the Act; and ordered the Company to cease and desist from its unfair labor practice and to bargain, upon request, with the Union (J.A. 1, 17–20).

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals (with Judge Bell dissenting) declined to enforce the Board's order. At the outset, the court quoted the statement in *Celanese Corp. of America* v. *National Labor Relations Board*, 291 F. 2d 224, 225 (C.A. 7), certiorari denied, 368 U.S. 925, that the Board's "wide discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives * * * lies in the initial promulgation of rules and regulations"; but that once those rules were promulgated, it was the court's function, applying the substantial evidence standard, to "determine whether the record as a whole supports the [Board's] findings and conclusions respecting compliance" therewith (App. B, *infra*, pp. 32–33). Noting that the Board had ruled that an election would not be set aside because of misrepresentations in campaign statements unless "(1) there has been a material misrepresentation of fact, (2) this misrepresentation comes from a party who had special knowledge or was in an authoritative position to know the true facts, and (3) no other party had sufficient opportunity to correct the misrepresentations before the election" (App. B, *infra*, p. 37, again quoting from *Celanese*),[10] the court held that the Board's conclu-

[10] See *Hollywood Ceramics Co., Inc.*, 140 NLRB 221, and the discussion n. 13, *infra*.

sion that the leaflet did not contain a material misrepresentation of fact, and thus did not interfere with the employee free choice, was "not supported by substantial evidence" (App. B, *infra*, p. 41).[11]

The court further ruled that the "irregularities in election procedure caused by substantial omissions of Board agents" required a new election. In the court's view, these irregularities "made it highly probable that eligible employees were deterred from voting while at least thirty others were allowed to vote after the polls should have been closed" (App. B, *infra*, pp. 41–43).

Judge Bell, dissenting, stated that the court had invaded "an area which I think is peculiarly within the expertise of the Board to overthrow a result they do not like" (App. B, *infra*, p. 48).

REASONS FOR GRANTING THE WRIT

1. In setting aside the Board's determination that the union's election leaflet neither contained material misrepresentations nor interfered with the employees' free choice in the election, the court of appeals applied the wrong standard of review. As we show below,

[11] In the court's view, the leaflet contained a material misrepresentation of fact, even if read as referring to contracts which the Union had with other companies in New York, because "free medical benefits of dependents in New York did not extend generally to clinical services" (App. B, *infra*, pp. 38–39). The court further found that the leaflet created the false impression that the Company itself had contracts with the Union in New York. Accordingly, although agreeing with the Board that the "language in the leaflet admittedly injects some ambiguity," the court concluded that it was "inclined to agree with the Company on its view of the impact of this language" on the employees (App. B, *infra*, pp. 39–40).

there is no dispute as to the facts involved in those issues; the question is the propriety of the inference that the Board drew from these undisputed facts that the election fairly and effectively enabled the employees to record their wishes on the question of union representation. This Court has recognized that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and *safeguards* necessary to insure the fair and free choice of bargaining representatives by employees" (*National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330, emphasis added), and we submit that the propriety of the Board's exercise of that discretion in a particular case is not to be tested under the traditional substantial evidence rule. Rather, the Board's determination in this area, like its "determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law" (*National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 131); and like its selection of an appropriate unit for bargaining, it is "rarely to be disturbed" (*Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491).

In the 1961 Term the Board asked this Court to review the same issue, but the Court declined. *National Labor Relations Board* v. *Celanese Corp. of America*, 368 U.S. 925. Since then, there have been a number of cases in which both the court below and other courts of appeals have continued to apply an improper standard of review, *i.e.*, in setting aside

Board determinations that certain union conduct did not require a new election they have failed to recognize the Board's wide discretion and the narrow scope of review.[12] This pattern, we believe, is likely to continue if the decision below stands. Since such judicial supervision of Board elections is likely to have a seriously adverse effect upon the rights of employees to bargain collectively through representatives of their own choosing (see *infra*, pp. 18–19), we submit that, despite the denial of certiorari in *Celanese*, it would now be appropriate for this Court to review the issue.

a. The ultimate determination for the Board in passing upon challenges to a representation election is whether the election constituted a dependable expression of the employees' free choice of a bargaining representative. That determination involves two elements: (1) ascertaining the facts and (2) making a judgment as to the probable effect of those facts upon the exercise of the employees' free choice. The first function frequently requires the Board to make factual findings upon such questions as what the union or the company told the employees, whether those statements were true,

[12] See *Graphic Arts Finishing Co.* v. *National Labor Relations Board* (C.A. 4), decided June 19, 1967 (reprinted in App. C, *infra*, pp. 51–58); *National Labor Relations Board* v. *Bonnie Enterprises*, 341 F. 2d 712 (C.A. 4); *National Labor Relations Board* v. *Schapiro & Whitehouse, Inc.*, 356 F. 2d 675, 678–679 (C.A. 4); *National Labor Relations Board* v. *Trancoa Chemical Corp.*, 303 F. 2d 456 (C.A. 1); *National Labor Relations Board* v. *Houston Chronicle Publishing Co.*, 300 F. 2d 273 (C.A. 5). See also *Cross Co.* v. *National Labor Relation Board*, 288 F. 2d 188 (C.A. 6). But cf. *Macomb Pottery Co.* v. *National Labor Relations Board* (C.A. 7), April 18, 1967, 65 LRRM 2055.

etc.—findings which properly are to be tested by the substantial evidence standard. The second function, however, involves the application of the Board's expertise, based upon its experience in conducting thousands of representation elections every year (see *infra*, p. 18), to an area in which Congress has given the agency wide discretion. See *A. J. Tower, supra; National Labor Relations Board* v. *Waterman Steamship Co.*, 309 U.S. 206, 226. The reviewing court, therefore, should not disturb the Board's conclusion that union or company conduct did or did not interfere with the employees' freedom of choice in a representation election unless it is unreasonable.

b. In the present case the Board's refusal to order a new election was not unreasonable. There was no dispute as to the facts, *i.e.*, what the union did and said; the only issue was whether the statements in the union leaflet precluded a fair election. The record does not contain evidence dealing directly with the effect of the leaflet on the employees, and the very nature of that issue indicates that direct evidence thereon would have little probative effect. See *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 231. Thus, in reviewing the Board's conclusion that the statements in the leaflet did not preclude the election from dependably expressing the employees' free choice, the reviewing court should have asked whether in all the circumstances, the Board's conclusion was reasonable. To frame the issue in terms of substantial evidence is likely to lead the court to substitute its judgment for that of the Board on an issue committed to agency discretion.

That, we submit, is what the court did here in using the substantial evidence test. Although the court purported to apply the Board's own standards for determining whether to set aside an election for misrepresentations in campaign statements (see *supra*, p. 10),[13] a fair reading of the court's opinion demonstrates, we believe, that the court in fact made its own independent judgment as to whether the misstatements in the leaflet were material, *i.e.*, whether they were likely to have had a significant effect upon how the employees voted. Compare the majority and dissenting opinions on this point.

c. We submit that the Board acted reasonably in concluding that the union's leaflet did not mislead the employees. The basic charge in the leaflet was correct,

[13] The Board does not set aside every election involving untruthful statements by one of the parties. See, *e.g.*, *Horder's, Incorporated*, 114 NLRB 751, 753; *The DeVilbiss Company*, 115 NLRB 1164, 1166–1167; *Verson Mfg. Co.*, 114 NLRB 1297; *Comfort Slipper Corp.*, 112 NLRB 183, 184–185. This policy of nonintervention rests on the realistic premise that the employees, as a result of their common sense and experience in political elections, have learned that hyperbole and inaccuracies usually accompany an intense campaign and therefore can be trusted to evaluate and discount claims that are made preliminary to a representation election. Where special circumstances occur, however, which impair the ability of the employees to evaluate the propaganda—e.g., where both a material misrepresentation has been made so soon before the election that the other side could not reply *and* the employees in all probability gave particular weight to the misrepresentation because the party making it had special knowledge of the true facts—this premise is no longer true, and the Board will ordinarily require a new election. See *Hollywood Ceramics Co., Inc.*, 140 NLRB 221, 223–224; *Gummed Products Co.*, 112 NLRB 1092, 1093–1094; *Merck & Co.*, 104 NLRB 891, 892.

i.e., that union employees of some of the shoe companies in New York received better benefits in terms of wage increases, hospitalization, and pensions than Company employees, and that those union members and their dependents received free surgical, clinical and optical services (benefits the Company did not provide). The only respect in which the leaflet was inaccurate, in describing the benefits given by other shoe companies, was in stating that dependents received all clinical services free, whereas in fact they paid half the cost of such services. Dependents did, however, obtain without charge complete hospitalization and surgical services. In these circumstances, the Board was warranted in concluding that this relatively minor misstatement did not impair the employees' free choice (J.A. 73–74). As Judge Bell observed in dissent (App. B, *infra,* p. 48), "certainly the Board is in better position to judge than [the] court which has only the opinion of company counsel to support its conclusion."

The Board also reasonably concluded that the employees were not misled into believing the leaflet referred to Company contracts with the union in New York, since the leaflet itself referred to contracts "for some of the shoe companies" in New York (J.A. 10–11). As Judge Bell added (App. B, *infra,* p. 49), the court's contrary conclusion is "speculation, and if I were going to speculate I would assume that after a long and bitter campaign, the employees would all know whether the company had in fact signed advantageous contracts with the union at other plants."

In sum, it was clearly "within the Board's province

to find" that the inaccuracy or ambiguity in the leaflet did not affect the fairness of the election. See *National Labor Relations Board* v. *Mattison Machine Works*, 365 U.S. 123.

2. In concluding that the election was invalid for the further reason that there had been "maladministration" of the mechanics of conducting it, the court of appeals similarly applied the wrong standard of review. Here, too, the court improperly substituted its judgment for that of the Board on a matter which was particularly entrusted to the agency. See *National Labor Relations Board* v. *A. J. Tower Co.*, 329 U.S. 324, 330. The Board found that 90 percent of the eligible voters working on election day actually voted; that no eligible employee (save one, whose vote would not have affected the result) was turned away from the polls; that an opportunity to vote was afforded all employees who appeared at the polls; and that the delays in the balloting were attributable to the Company, not the Board (J.A. 111, 113–114, 124).[14] On these facts, the Board reasonably concluded that neither possible deterrence of eligible voters nor voting by employees who joined the line after it had been closed but while the polls were still open, required a new election (J.A. 124). The court of appeals, however, did not seek to determine whether this conclusion was reasonable, but set aside the election on the

[14] See *International Telephone & Telegraph Corp.* v. *National Labor Relations Board*, 294 F. 2d 393, 395 (C.A. 9):

"Surely it would be vain for this court to hold that we are better equipt than the NLRB to determined whether the opportunity given employees to vote was 'adequate' unless clear error was shown."

basis of the Company's contentions that it was "highly probable that eligible employees were deterred from voting" and that "at least thirty others were allowed to vote after the polls should have been closed" (App. B, *infra*, pp. 42–43).

3. The Board conducted 8,324 representation elections during the past fiscal year, and in 1,471 of these the losing party filed objections to the election.[15] A large proportion of these objections involve claims that there have been material misrepresentations during the campaign or irregularities in the mechanics of the election. The Board, on the basis of its extensive experience in conducting elections, makes a judgment as to whether the alleged misrepresentations or irregularities require a new election; the number of cases in which a new election is ordered is relatively small.[16]

The decision below, however, by permitting the reviewing court to second-guess the Board on this issue, undoubtedly will lead to a substantial increase in the number of court challenges to Board election rulings. Such rulings cannot be reviewed directly, but only in connection with review of a subsequent unfair labor practice proceeding growing out of a refusal to bargain because of a claim that the election was improper. Employers who are reluctant to fulfill their statutory bargaining obligation thus are likely to refrain from bargaining after the union has won a close election, in the hope of persuading the court of appeals

[15] Thirty-first Annual Report of the National Labor Relations Board, p. 203 (G.P.O., 1967).

[16] See the Board's thirty-first Annual Report, *supra*, n. 15, p. 204.

to invalidate it. The likely result would be to thwart the congressional purpose of avoiding industrial strife by requiring prompt collective bargaining between employees and representatives selected by employees. "Repeated appellate court litigation without allowing considerable discretion on the part of the NLRB thwarts this policy by nurturing continuing uncertainty and argument between the parties where decision—even occasionally erroneous decision—tends to disperse attention." *International Telephone* case, *supra,* n. 14; see *A. J. Tower, supra.*

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1967.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et. seq.*) are as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargain-

ing representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

Sec. 10 * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency,

shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

United States Court of Appeals
for the Fourth Circuit

No. 10552

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BATA SHOE COMPANY, INC., RESPONDENT; UNITED SHOE WORKERS OF AMERICA, AFL–CIO, INTERVENOR

On Petition for Enforcement of an Order of the National Labor Relations Board.

Argued January 11, 1967—Decided April 6, 1967

Before BRYAN, BELL and CRAVEN, Circuit Judges

CRAVEN, *Circuit Judge*: The National Labor Relations Board petitions for enforcement of its order that Bata Shoe Company enter into collective bargaining with the United Shoe Workers of America, AFL–CIO (hereinafter the Union). Following a consent election [1] on April 23, 1965, the Union was certified as exclusive representative for production and maintenance employees at the Company's Belcamp, Maryland, plants. The Company's refusal to bargain with the Union enables judicial review of the certification incident to the Section 8(a)(5) unfair labor practice proceeding.[2]

[1] The election was conducted pursuant to a "Stipulation for Certification upon Consent Election" entered into by the Company and Union.

[2] The Labor Board's decision in the unfair labor practice case is reported at 61 L.R.R.M. 1364 (February 24, 1966).

The Company has challenged on a plethora of grounds the election and certification of the Union.[3] The Company asserts generally that the integrity of the election was impaired by misrepresentations in Union campaign literature, coercive activity on the part of Union adherents, and confusion accompanying the conduct of the election which prevented eligible employees from exercising their franchise and improperly permitted others to vote.

The results of the election show that 1,082 ballots were cast for and 1,036 ballots against the Union, six ballots were voided, and forty-one challenged. There were approximately 2,583 potential participants. No resolution of the challenges was made since they were not sufficient in number to affect the results of the election.

The Company filed with the Regional Director for the Labor Board timely objections to the election in accord with Board rules.[4] Following prescribed procedure in stipulated consent elections,[5] the Regional Director made an *ex parte* investigation of the objections and issued a written report in which he recommended that the Company's objections be overruled in their entirety and that the Union be certified. After consideration of the Regional Director's report and the Company's written exceptions—but without ordering a hearing—the Labor Board rendered a decision in which it adopted the Regional Director's recommendations for the reasons set forth in his report and certified the Union as exclusive bargaining representa-

[3] In the conclusion to its "Exceptions to Regional Director's Report on Objections" to the representation election, the Company sets out twenty-three incidents which it maintains individually necessitate setting aside the election and cumulatively "clearly compel" this action.

[4] NLRB Rules & Regs. § 102.69(a), 29 C.F.R. § 102.69(a).

[5] NLRB Rules & Regs. § 102.69(c), 29 C.F.R. § 102.69(c).

tive of the Company unit. The Labor Board, in deciding the election questions on the written record necessarily, under its own rules, determined at this juncture that the Company's exceptions did "not raise substantial and material issues with respect to the conduct or results of the election. * * *"[6]

Notwithstanding certification the Company continued its refusal to recognize and bargain with the Union and a Section 8(a)(5) unfair labor practice compaint was issued.[7] In its answer to the complaint the Company alleged, in addition to misconduct in connection with the election, that it had been denied a hearing on substantial and material issues of fact and law raised by its objections to conduct affecting the results of the election and its exceptions to the Regional Director's report.

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[6] Section 102.69(e) of the NLRB Rules and Regulations provides that in cases involving consent elections pursuant to Section 102.62(b) (Stipulation for Certification upon Consent Election): "If exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and *it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record*, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer. * * * Upon the close of the hearing the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the disposition of the challenges or objections or both if it be a consolidated report." 29 C.F.R. § 102.69(e). [Emphasis added.]

[7] Section 8(a)(5) of the National Labor Relations Act provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with representatives of his employees. * * *" 29 U.S.C.A. § 158(a)(5).

Two days before the unfair labor practice hearing the Company filed with the Labor Board a motion to rescind the certification, to reconsider and permit the Company to be heard in the representation case, and to postpone the unfair labor practice hearing until final determination of the issues in the representation case. The Board by telegraphic order denied the motion "with leave to the Employer to request the Trial Examiner to permit the issues raised in the Employers Objections and Exceptions filed in [the representation case] * * * to be heard * * * " in the unfair labor practice proceeding. The Board found "[t]he Employers contention that litigation of such issues in a complaint proceeding would substantially prejudice his rights * * * without merit."

The 8(a)(5) hearing commenced with a discussion of the Labor Board's instructions in which the Trial Examiner conceded that he had not resolved the question of the extent of his responsibility in the representation matter and suggested that this be argued to him by the parties along with the other issues in the proceeding. The essence of the Trial Examiner's position was, as stated to the parties at the hearing, that the Company

> should seek to do whatever it is you think ought to be done in either the complaint case or the misrepresentation case. * * * And I would assume since you seek to have this certification set aside in effect, if not in fact in this proceeding by interposing your affirmative defenses that you wish to raise in this proceeding anything that you might have legitimately raised in the representation proceeding.

At the invitation of the Trial Examiner, counsel for the Company outlined the various objections which had been set forth in its answer to the complaint, and then reviewed in some detail the nature of the evi-

dence the Company was prepared to offer of alleged irregularities in the conduct of the representation election. Although the Trial Examiner subsequently reiterated that he would receive all evidence advanced by the Company in support of its objections to the election, the Company offered the oral testimony of but a single witness on a minor matter.[8] The Company explains its failure to come forward with additional evidence at the hearing on the ground that the Trial Examiner had no authority to act with respect to the certification in the case and, therefore, presentation of additional evidence would have been futile.

The Trial Examiner's decision, which was adopted by the Labor Board in its order to bargain, resolves the question of his authority in the unfair labor practice proceeding. The Trial Examiner states in his decision that

> [i]n my view, the initial question before me was whether Respondent [Company] has offered me sufficient evidence to cause me to conclude that the Regional Director and the Board acted on erroneous or incomplete material findings, and the question of the merit of the objections is before me only to the extent that the evidence offered by Respondent [Company] requires reconsideration of the findings and conclusions in the representation case.

The Trial Examiner goes on to conclude in his decision that apart from one minor matter, the Company

> adduced no evidence to controvert or supplement the findings of the Regional Director with respect to [its] * * * objections to the conduct of the election, and, absent such evidence, I consider myself bound by the conclusions previously reached by the Regional Director and

[8] Whether some documentary evidence was offered is considered *infra* at page 38.

affirmed by the Board in certifying the Union as representative of Respondent's employees.

We are presented with a procedural question of controlling importance. Was the Company entitled to a post-election hearing on its objections to the election and if so entitled was it afforded a sufficient hearing in the Section 8(a)(5) proceeding?[9]

Due process of law demands and the present Rules and Regulations of the Labor Board provide that where there is a substantial and material issue of fact relating to the validity of a representation election that a hearing be conducted *at some stage* of the administrative proceeding before the objecting party's rights can be affected by an enforcement order. *United States Rubber Co.* v. *NLRB,* 64 L.R.R.M. 2393 (5th Cir. Feb. 20, 1967); *NLRB* v. *Lamar Elec. Membership Corp.,* 362 F. 2d 505 (5th Cir. 1966); *NLRB* v. *Capital Bakers, Inc.,* 351 F. 2d 45 (3d Cir. 1965);

[9] The present case involves an election pursuant to a "Stipulation for Certification Upon Consent Election." See NLRB Rules & Regs. § 102.62(b), 29 C.F.R. § 102.62(b). This is to be distinguished from an election pursuant to an "Agreement for Consent Election" in which the parties agree that objections and challenges are to be resolved by the Regional Director whose rulings "shall be final." See NLRB Rules & Regs. § 102.62(a), 29 C.F.R. § 102.62(a). We need not in the present case decide whether a post-election hearing may be required following the latter type of consent election. In such cases the Fifth Circuit has held that due process requires a hearing. *NLRB* v. *Sidran,* 181 F. 2d 671 (5th Cir. 1950). Contra, *e.g., Elm City Broadcasting Corp.* v. *NLRB,* 228 F. 2d 483 (2d Cir. 1955); *NLRB* v. *Standard Transformer Co.,* 202 F. 2d 846 (6th Cir. 1953). *But see NLRB* v. *Parkhurst Mfg. Co.,* 317 F. 2d 513 (8th Cir. 1963), distinguishing *Sidran.* The "Agreement for Consent Election" currently in use by the Labor Board provides the "method of investigation of objections and challenges, *including the question of whether a hearing should be held in connection therewith,* shall be determined by the Regional Director whose decision shall be final." [Emphasis added.]

ILGWU v. *NLRB*, 339 F. 2d 116 (2d Cir. 1964); *NLRB* v. *Ideal Laundry & Dry Cleaning Co.*, 330 F. 2d 712 (10th Cir. 1964); *NLRB* v. *Joclin Mfg. Co.*, 314 F. 2d 627 (2d Cir. 1963); *NLRB* v. *The Lord Baltimore Press*, 300 F. 2d 671 (4th Cir. 1962); *NLRB* v. *Poinsett Lumber Mfg. Co.*, 221 F. 2d 121 (4th Cir. 1955); *NLRB* v. *West Texas Utilities Co.*, 214 F. 2d 732 (5th Cir. 1954); NLRB Rules & Regs. § 102.69; 29 C.F.R. § 102.69. To borrow the words of Judge Brown, writing for the Fifth Circuit, "it is clear that § 8(a)(5) orders which rest on crucial factual determinations made after *ex parte* investigations and without a hearing cannot stand." *NLRB* v. *Air Control Prods. of St. Petersburg, Inc.*, 335 F. 2d 245, 249 (5th Cir. 1954).

Conversely, there is no requirement, constitutional or otherwise, that there be a hearing in the absence of substantial and material issues crucial to determination of whether NLRB election results are to be accepted for purposes of certification. See *NLRB* v. *Sun Drug Co.*, 359 F. 2d 408 (3rd Cir. 1966); *NLRB* v. *Nat'l Survey Serv., Inc.*, 361 F. 2d 199 (7th Cir. 1966); *NLRB* v. *Air Control Prods. of St. Petersburg, Inc.*, 335 F. 2d 245 (5th Cir. 1964); *NLRB* v. *J. J. Collins' Sons, Inc.*, 332 F. 2d 523 (7th Cir. 1964); *NLRB* v. *Clearfield Cheese Co.*, 322 F. 2d 89 (3d Cir. 1963); *NLRB* v. *O. K. Van Storage, Inc.*, 297 F. 2d 74 (5th Cir. 1961); see generally 1 Davis, Administrative Law §§ 7.01–.07 (1958). A hearing is unnecessary, therefore, where if all the facts contended for by the objecting party "were credited no ground is shown which would warrant setting aside the election." *NLRB* v. *Air Control Prods. of St. Petersburg, Inc., supra*, 335 F. 2d at 249; *accord, NLRB* v. *Sun Drug Co., supra*, 359 F. 2d at 414; *NLRB* v. *Wilkening Mfg. Co.*, 207 F. 2d 98, 100 (3d Cir. 1953).

It is settled that the burden is on the party objecting to the conduct of a representation election to prove that there has been prejudice to the fairness of the election. *NLRB* v. *Mattison Mach. Works,* 365 U.S. 123 (1961). And in order to be entitled to a hearing on its objections to an election the objecting party must make a proffer of evidence "which *prima facie* would warrant setting aside the election." *NLRB* v. *O. K. Van Storage, Inc., supra,* 297 F. 2d at 75; see *United States Rubber Co.* v. *NLRB, supra,* 64 L.R.R.M. at 2396. The determination, however, of whether substantial and material factual issues have been raised so as to necessitate a hearing is a question of law and ultimately a question for the courts. See *United States Rubber Co.* v. *NLRB, supra; NLRB* v. *Sun Drug Co., supra; NLRB* v. *Ideal Laundry & Dry Cleaning Co., supra; NLRB* v. *Joclin Mfg. Co., supra; NLRB* v. *Poinsett Lumber Mfg. Co., supra.*

For reasons which are apparent from our subsequent discussion in this opinion,[10] we believe the Company's objections to the election and exceptions to the report of the Regional Director raised material and substantial factual issues which entitled it to a hearing. But we are of the opinion that a sufficient hearing was accorded the Company in the Section 8(a)(5) proceeding. That the Company chose not to present more evidence than it did in support of its previous contentions does not entitle it to another opportunity. The Trial Examiner, as noted above, expressed his willingness to receive all evidence offered and to reconsider the *ex parte* findings if the new evidence indicated them to be incomplete or erroneous.

This court is in accord with other circuits in rejecting the Company's contention that it is entitled to

[10] See, *e.g.*, discussion, *infra*, at pages 16–17.

separately litigate the representation issues. Adjudication of such issues in the 8(a)(5) proceedings does not, we think, substantially prejudice the company's rights. In *NLRB* v. *Poinsett Lumber & Mfg. Co.* this court stated that where the objecting party raising material and substantial factual issues does not have an opportunity to be heard before the 8(a)(5) hearing it "was entitled to present its evidence at the unfair labor practice hearing before the Trial Examiner. * * *" *Supra,* 221 F.2d at 123; accord, e.g., *NLRB* v. *Capital Bakers, Inc., supra; NLRB* v. *Ideal Laundry & Dry Cleaning Co., supra; NLRB* v. *The Lord Baltimore Press, supra;* see *Inland Empire Dist. Council* v. *Millis,* 325 U.S. 687 (1945). So long as the objecting party (and his election adversaries) is given the opportunity to be heard, to call and cross-examine those who are the source of Board evidence, and to present pertinent evidence of its own the hearing is fundamentally fair and satisfies the requirements of due process.

The intervenor Union argues to this court, as it urged upon the Trial Examiner, that the 8(a)(5) proceeding was a hearing to receive and consider evidence *de novo.* We do not agree, but think with the Labor Board that in hearings on objections to the conduct of representation elections the findings of the Regional Director, here embodied in his "Report on Objections," will be *prima facie* "sufficient against which to consider the evidence adduced at the hearing and need not be reproved [sic] in what might otherwise become protracted hearings." To hold otherwise would invite protracted delay in the certification process.[11]

[11] "[I]t is implicit in the [Labor] Act that questions preliminary to the establishment of the bargaining relationship be expeditiously resolved. * * *" *NLRB* v. *O.K. Van Storage, Inc., supra,* 297 F. 2d at 76. The importance of expeditiously dealing

II

We now turn to a consideration of the facts of record, which include those developed at the unfair labor practice proceeding and in the Regional Director's "Report on Objections" to the election,[12] to determine whether the Labor Board's certification of the union and consequent finding of an 8(a)(5) violation were based on facts supported by substantial evidence and on the application of correct legal standards. We think not and deny enforcement.

We approach the merits of this case fully cognizant that Congress has entrusted the Labor Board "with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by em-

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with questions in the certification process is compounded by the sheer number of representation elections conducted by the Board. The Board conducted 7,974 such elections during the 1966 calendar year. Experience shows that objections are filed in approximately nine percent of the elections and some seventeen percent of those in which objections are filed are set aside by the Board. In over thirty percent of the re-run elections, the results differ from those in the original election. See Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C.L. Rev. 209 (1963).

[12] Congress has provided in Section 9(d) of the National Labor Relations Act, as amended, 29 U.S.C.A. § 159(d):

"(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) [providing for representation elections and certification] of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

ployees." *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946); *accord, NLRB* v. *Watermann S.S. Corp.*, 309 U.S. 206, 226 (1940). However, as has been said by the Seventh Circuit,

> There is no conflict or contradiction between the substantial evidence rule determinative of the scope of review and the principle whereunder the Board is entrusted with wide discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives as enunciated in *National Labor Relations Board* v. *A. J. Tower Co.* These rules do not conflict because they affect differing spheres of activity. The Board's wide discretion lies in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving application of the Board's rules. Judicial review in these cases is not concerned with the policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board. *Celanese Corp.* v. *NLRB*, 291 F. 2d 224 (7th Cir. 1961) (Citation omitted).

The Company's principal objections to the conduct of the election may be divided broadly between those relating to campaign literature and those involving procedural irregularities. The Company argues first that the election should be set aside because of material misrepresentations in Union literature during the pre-election period which prevented employees from making a "free choice." See *General Shoe Corp.*, 77 N.L.R.B. 124, 126–27 (1948).

The Company points to Union materials concerning the role of the Government on the Union's behalf which were distributed on February 3, March 10,

April 22, and April 23, the day of the election. Typical of the statements made is the following distributed on April 22:

> Some of the workers have asked if they will lose any benefits they now have if they vote for the union! The answer is NO! Our Government protects the workers' benefits that are now in effect. Your Union will negotiate to add to these benefits![13]

The Regional Director's Report on Objections, the recommendations and reasoning in which were adopted by the Labor Board, found these were "material misrepresentations and not merely artless statements of the function of the * * *" Labor Board. Notwithstanding this specific finding, mitigating conditions were thought sufficient to reject this challenge to the fairness of the election. The mitigating circumstances enumerated were the experience of the Company employees who had been through a number of NLRB elections, including one in December 1963; the Company's

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[13] Other statements included:

"Union members know benefits 'achieved * * * through their union * * * cannot be chiseled away or forgotten, because they are spelled out in union contracts which have the backing of the U.S. Government and the strongest shoe workers union in the country. * * * [W]e suggest you sign and mail yours [authorization card] immediately. THE SOONER YOU DO—THE SOONER USWA AND UNCLE SAM CAN GO TO WORK FOR YOU.' (February 3)."

"Benefits gained by union members 'are more than company whims and promises. They are real because they are contained in union contracts which have been signed by the company and the union with the backing of the U.S. Government.' (March 10)."

"They know the difference between promises and a union contract. They know—as Bata workers know—that Company promises made before an election mean nothing unless they are contained in a union contract and guaranteed by the Government of the United States. (April 23)."

letter to its employees of February 4, 1965, asserting that the Union was trying to "mislead" employees into believing it is somehow tied into the United States Government and noting that this is "untrue" and that the Government "specifically rejected all the Union's claims in the last election;" the further opportunity for a Company reply to the Union's letter of March 10; and the fact that the pertinent statements in Union literature distributed on April 22 and 23 raised no new issues in addition to those which the Company responded to on February 4 or could have responded to subsequently had it elected to do so.

The Company also singles out a Union leaflet distributed on April 20, two days before the election. The leaflet, which is entitled "How Bata Cheats You" and closes with "Vote Yes Stop the Cheating," compares what is described as the "Bata" and "Union contract" ways of computing compensation for piece rate workers and asks whether any Bata worker knows how overtime is figured by the Company on Saturdays. The Company maintains that this literature contained material misrepresentations which mislead the employees. But the Regional Director found that the Company had adequate opportunity in which to respond to any misrepresentation and in addition possessed the most comprehensive knowledge of the facts presented as "Bata's Way". The Company, however, failed to discuss this leaflet in in its newspaper published on April 22 and devoted entirely to anti-Union propaganda. Moreover, the Regional Director found that "because most of the employer's production employees are piece workers, the employees themselves would be in an excellent position to evaluate the truth or falsity of "Bata's Way". The Regional Director also concluded that on

the facts before him the statements regarding the Union's way were not misrepresentations.

The Company labels untrue and inflammatory a charge first made in a Union leaflet of April 8 that the Company was flooding the plant with Japanase insoles. The charge was repeated in Union literature issued April 14 and 20, and was mentioned in a community newspaper article on April 22. The Regional Director reasoned, however, without considering whether the Union's allegation was true, that the Company "could and in fact did refute this charge on April 9 and 14, 1965." The Company newspaper on April 9 characterized the Union's charges on April 8 as "deliberate lies," assured Company employees that the only Japanese insoles imported by Bata were for testing purposes in 1963, and announced that Company officers would contribute $1,000.00 to the Blood Bank of Maryland if the Union could support its claim. A letter from the Company president to employees on April 14 called their attention to the fact that the Union had failed to support its charge and, therefore, should itself pay the $1,000.00 to the Blood Bank.

We do not quarrel with the conclusions of the Regional Director or Labor Board in respect to their treatment of the literature discussed above. We believe the Board has applied correctly the applicable principles. The true rule is not "that when false statements are made they constitute an interference with free choice, but that *when* false statements are made which constitute an interference with free choice, for or against a bargaining representative, an election should be set aside." *Anchor Mfg. Co.* v. *NLRB,* 300 F. 2d 301, 303 (5th Cir. 1962). Misconduct must be shown to have prejudiced the fairness of the election. See *NLRB* v. *Mattison Mach. Works, supra.*

The policies of the Labor Board are well suited to implement this principle. Election results are not to be disturbed when challenged because of misrepresentations in campaign propaganda unless "(1) there has been a material misrepresentation of fact, (2) this misrepresentation comes from a party who had special knowledge or was in an authoritative position to know the true facts, and (3) no other party had sufficient opportunity to correct the misrepresentations before the election." *Celanese Corp.* v. *NLRB,* 291 F. 2d 224, 226 (7th Cir. 1961); see *NLRB* v. *Bonnie Enterprises, Inc.,* 341 F. 2d 712, 714 (4th Cir. 1965); Annot., 3 A.L.R. 3d 889 (1965); *cf. Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 60 (1966); see generally Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv. L. Rev. 38, 82–92 (1964); Fuchs, *Pre-election Campaign Propaganda & Activities Before the National Labor Relations Board,* 4 B.C. Ind. & Com. L. Rev. 485 (1963).

The Company's challenge to the content of a leaflet distributed by the Union on the eve of the election, April 22, presents the most important attack on the integrity of the proceeding. This leaflet was addressed to Mr. Dolezal, Company president, and stated in part:

> In *your New York union contracts* which your attorneys Seligman and Seligman participated for some of the shoe companies, the following benefits are in effect:
>
> * * * ["Union benefits" and "Bata" health, pension and wage benefits are contrasted in a columnar presentation]
>
> THEREFORE, MR. DOLEZAL, SINCE YOUR HIGH PRICED ATTORNEYS, SELIGMAN AND SELIGMAN, HAVE THESE NEW YORK UNION AGREEMENTS, WHY NOT BE FAIR AND SHOW THEM TO BATA EMPLOYEES? [Italics added.]

The Company urges before this court that the "benefits" listed in this leaflet were in large part misrepresentations of fact. We agree with the Board that to the extent this Company objection relates to the benefits set out as those of the Bata employee it is not persuasive. Company employees may be presumed in this instance to have sufficient knowledge of their own work conditions so as not to be materially mislead.

However, we are unable to agree with the Board that the list of benefits "[i]n your New York contracts which your attorneys Seligman and Seligman participated for some of the shoe companies * * *" did not constitute a material misrepresentation. We believe this is so even assuming arguendo, as the Board concluded, that the reference is not to Bata Union contracts but labor agreements of other companies with the Union in New York. The Board itself specifically found that *at least* one pertinent contract placed in evidence by the Company "did not reflect all the benefits claimed by the * * *" Union in its leaflet.

The most important "Union" health benefit listed was *"Clinic*—For all union members and dependents: Includes free diagnosis—free doctor—free drugs—free X-ray, etc." The Board ignored that free medical benefits of dependents in New York did not extend generally to clinical services. The Board knew, or should have known, that this representation was substantially incorrect because the Company offered in evidence at the 8(a)(5) proceeding a major agreement providing limited clinical benefits for dependents of employees in New York locals.[14] The same

[14] The transcript of the hearing before the Trial Examiner below shows that counsel for the Company after the hearing was well under way and after certain exhibits of General Counsel had been received answered "yes" when asked by the Exam-

agreement was furnished the Regional Director by both the Company and the Union.[15]

In our opinion any misrepresentation of fact in respect to medical benefits in the New York contracts would be material—for this is a matter of vital concern to the ordinary worker. Especially is this so if as claimed in an adjacent column in the same leaflet the Company then "had no such clinic. * * *" Moreover, because the present leaflet was distributed on the eve of the election, there was insufficient time for the Company to make an effective reply.[16]

Furthermore, the Company asserts that this leaflet sought to convey to employees the false impression that the Company had contracts with the Union in New York. Indeed, the Company insists that "the

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iner, "With respect to the Boro Medical Center Agreement you wish to put that in evidence here. * * *" This is an adequate proffer of evidence under any modern code of civil procedure and should suffice in an administrative proceeding.

[15] The Labor Board adopted the decision of the Regional Director that the representation in respect to free medical services was "substantially correct". The Regional Director relied in making this finding entirely on a clause from the agreement between the Boro Medical Center and the Union's New York "Welfare Plan", to which employers contributed by reason of their collective bargaining agreements. This reliance, however, was erroneous since the clause provides only for free surgical—not clinical—services. A second clause in the same agreement, set out by the Company in its exceptions to the Regional Director's report, specifically requires dependents to pay fifty percent of the regular fee for clinic diagnostic services. Counsel for the Labor Board does not dispute the accuracy of this clause.

[16] The question of the accuracy of the statements made in this leaflet was concretely raised in the Company's exceptions to the Regional Director's Report on Objections and entitled the Company to litigate the question at the Section 8(a)(5) hearing.

only reasonable construction that can be placed upon it—is that the company has [favorable] contracts with the Union in New York." The Labor Board found, however, that the reference to "your" union contracts "is at worst 'inartistically or vaguely worded and subject to different interpretations,' and will not suffice to establish a misrepresentation . . ." of fact sufficient to set aside the election.

We are inclined to agree with the Company in its view of the impact of this language on the Bata employee,[17] although subsequent language in the leaflet admittedly injects some ambiguity. If we accept the position of the Board that *your* was used in this context "by way of designating a class" then the language used implies that *all* New York contracts with the Union contain the listed benefits. The Board found as a fact that this is not true and, therefore, even under the Board's theory there would be a material misrepresentation of fact. See *NLRB* v. *Bonnie Enterprises, Inc., supra.*

We conclude that the Labor Board erred in not setting aside the election under its own standards: there was a material misrepresentation of fact made by a party in an authoritative position to know the truth in circumstances which prevented an effective reply prior to the election. That all New York Union contracts contain superior health, pension and wage benefits, matters of importance to employees, and that Bata has contracts with organized units in New York which afford workers there substantially greater bene-

[17] The Company's position that "your" is reasonably understood to refer to the Company's New York contracts is strengthened by the use in the preceding paragraph of the leaflet of *you* five times in addressing the Company president and *your* as a possessive pronoun in conjunction with *office* to refer to the president's office.

fits than enjoyed by unorganized Maryland employees are both representations which when false may substantially prejudice the Company. When made without adequate time for answer by one's adversary, where as few as three votes can alter the election result,[18] such statements constitute an interference with employee free choice. The Labor Board's conclusion to the contrary in the present case is not supported by substantial evidence.

III

Aside from our decision that the Union literature distributed on April 22 prejudiced the fairness of the election, irregularities in election procedure caused by substantial omissions of Board agents responsible for balloting are themselves sufficiently serious to compel invalidation of the results.[19] The present case is clearly

[18] The ballots cast against the Union added to the number of challenged ballots combine to come within five votes of the total for the Company. In the last representation election, conducted in December 1963, the Union lost when the Board found all those who had cast challenged ballots eligible to vote and *all* had voted against the Union.

[19] The Company's objections to the mechanical aspects of the election are summarized by the Regional Director in his report: "Election conditions were such that a number of eligibles sufficient to affect the outcome of the election were deterred from voting and ineligibles were permitted to vote by: (1) Inadequate arrangements for processing the number of voters involved compounded by inclement weather; (2) Improper control of the voting lines; (3) Erroneous instructions by Board Agents with respect to the eligibility date; (4) Inadequate notice to eligibles as to the time employees must be in line in order to vote; (5) Improper delegation of authority to employees to cut off the voting line and a resulting situation where employees who were in line in time were disenfranchised and latecomers were permitted to vote."

one where "the Board agents nodded when they should have been alert and active". *Shoreline Enterprises, Inc.* v. *NLRB,* 262 F. 2d 933, 946 (5th Cir. 1959).

A fair and equal opportunity for all Company employees to vote was precluded by actions of the Board agent responsible for the election. The stipulated and publicized closing hours for voting was 5:15 P.M. The Board found that shortly before this time the agent in charge of the election caused an announcement to be made on the plant public address system 'that to be eligible employees must be in line by 5:15 P.M." At 5:15 the Board agent instructed three employees at the end of the line "that the line was closed and that if anyone attempted to get in line after them such persons should be directed to * * * the agent."

The Board found, however, "that as many as 30 employees got on the end of the line" after 5:15 and "[o]ne employee states that he did not get in line until about 6:30 P.M. and voted without question." At the same time the Board found that at least one other employee, Frank Chenoweth, was improperly prevented from voting. Chenoweth was in line before 5:15 but stepped off to enter the washroom and when he returned was, according to the Board, "denied the opportunity to cast even a challenged ballot by the agent in charge."

We agree with the Company that the maladministration of the election [20] made it highly probable that

[20] In addition to confusion surrounding the closing of the polls, the Board found that "soon after the opening of the polls at the instant election it was necessary to release departments at a time later than that designated on the posted releasing schedule because the line of voters extended well over 100 feet in length. From 10:00 A.M. to 4:15 P.M. a number of

eligible employees were deterred from voting while at least thirty others were allowed to vote after the polls should have been closed. When considered along with the fact that Chenoweth was improperly prevented from voting, in view of the very close results, it is our opinion that the Board abused its discretion [21] in refusing to set aside the election. *Cf. Shoreline Enterprises, Inc.* v. *NLRB*, 262 F. 2d 933, 943–46 (5th Cir. 1959); *NLRB* v. *West Texas Utilities Co.*, 214 F. 2d 732, 740–42 (5th Cir. 1954) *NLRB* v. *Wilkening Mfg. Co.*, 207 F. 2d 98 (3rd Cir. 1953).

It is unnecessary to consider the remainder of the Company's objections to the election. We conclude that the Board's order is not supported by substantial evidence.

Enforcement Denied.

ALBERT V. BRYAN, *Circuit Judge*, concurring specially: Clearly, the Board's order should not be enforced, for the reasons, at the least, assigned in the Court's opinion. It discards as a ground of decision, however, what seems to me is a fundamental infirmity in the Board's procedure—the denial of an opportunity for the employer to be heard on decisive issues in the case before they are decided. This deprivation occurs frequently and, for me, is so destructive of due

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first-shift voters spent an hour in line before receiving a ballot." Two employees stated that they did not go to the polls "because the line was too long and it was raining." The Board itself denies responsibility for the slow processing of voters and concludes that "it must lie with the Employer who furnished the eligibility list out-of-date with respect to transfers."

[21] This circuit has held that it is "for the Board, and it is not for this court, to exercise discretion as to 'whether or not the election should be set aside for irregularities in procedure.'" *NLRB* v. *Jesse Jones Sausage Co.*, 309 F. 2d 664, 667 (4th Cir. 1962) (quoting from *NLRB* v. *National Plastics Prods. Co.*, 175, F. 2d 755 (4th Cir. 1949).

process that it should be unequivocally disapproved.

I start with the warranted finding in the opinion that here the employer's "objections to the election and exceptions to the report" of the Regional Director did in truth pose "substantial and material issues with respect to the conduct or results of the election". The Board ex parte, i.e. without a hearing, had held otherwise. Incidentally, this decision was founded on the report of the Regional Director, who made his investigation of the objections ex parte and overruled them ex parte.

I heartily agree with the Court that "Due process of law demands and the present Rules and Regulations of the Labor Board provide that where there is a substantial and material issue of fact relating to the validity of a representation election that a hearing be conducted at some stage of the administrative proceeding before the objecting party's rights can be affected by an enforcement order". I am mindful, too, that there can be no judicial hearings as to the election's validity ahead of the refusal-to-bargain proceeding; the hearing I insist upon is a fair *administrative* hearing only. My departure from the opinion of the Court is in its conclusion that since the company *after the decision of the Board* had an opportunity to present evidence before the Examiner, the company was thus afforded a "sufficient hearing".

"Hearing", it is hornbook, presupposes an unprejudged judgment on the issues at stake. Otherwise it is an obvious mockery of due process. The procedure, instantly amounted to just that. Admittedly, the "substantial and material issues"—validity of the election—were completely and finally decided by the Board, ex parte, long before the hearing of the employer by the Examiner. It had been put aside by the Board as definitely settled, until the unfair practice

case came on before the Examiner. The company was then, for the first time, allowed to put on evidence about the election, and then only before a subordinate of the Board who was thus called upon to review his superiors' determination. This post-decision "hearing" is now, I think erroneously, held to be a "sufficient hearing".

The Board's procedure cannot be justified as analogous to the practice of courts to rule upon motions for reconsideration or rehearing without the presence of the parties or the presentation of further evidence or arguments. In court such motions and rulings have been preceded by a full hearing when the issues, as the Court declares instantly, are substantial and material. But presently the sole and exclusive chance accorded the employer to submit its case fully was the hearing before the Examiner, some time after the Board's determination of the issue. The Examiner was then to decide whether the *Board* had been right—a decision to be made "under the gun" of the Board. It is as if an appellate court had rendered an opinion without a hearing and then, without vacating it, had given permission to the unsuccessful litigant to ask the lower court to allow a hearing and decide whether the appellate ruling should stand—this in turn to be re-reviewed by the appeals court.

Curtailment of a party's rights in an administrative proceeding in this manner was condemned in Morgan v. United States, 304 US 1 (1938). In discussing the fundamental requisites of an administrative hearing, with particular reference to the conduct of the Secretary of Agriculture under the Packers and Stock Yards Act, strikingly similar to the procedure of the Board here, the Chief Justice said:

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing part and *to meet them*. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and *to be heard upon its proposals before* it issues its final command. 304 US at 18. (Accent added.)
>
> * * * * *
>
> Congress, in requiring a "full hearing," had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps. 304 US at 19–20.

This same thesis was expounded, and applied by refusal to enforce the Board's order because passed upon a contrary procedure, in *Russell-Newman Mfg. Co.* v. *NLRB,* 370 F. 2d 980, 984 (5 Cir. 1966), the Court saying:

> Due process in an administrative hearing includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law. * * *

Nor can an employer be treated in this cavalier fashion on the score of expedition. Rights cannot be sacrificed in the name of dispatch. Nor is it legalized because the adjudicating tribunal cannot devise a better process. *Cf. Russell-Newman Mfg. Co.* v. *NLRB, supra,* 370 F. 2d 980, 984; *NLRB* v. *Trancoa Chemical Corp.,* 303 F. 2d 456, 461 (1 Cir. 1962).

When the Court found, as it has, that the objections and exceptions of Bata were not frivolous but nevertheless had been disposed of ex parte, then the Court should have immediately set aside the Board's order. Not only was this a clear refusal of due process; it was irremediable under the Board's established procedures. A post-decision "hearing" hardly fulfills the "hearing at some stage of the proceedings" now demanded by the Court and by the precedents it cites.

> In consequence a court cannot properly enforce an order finding an employer guilty of an unwarranted refusal to bargain with a union certified in an election if it appears, with respect to challenges affecting the result, either that they were disposed of erroneously as a matter of law or that the employer raised 'substantial and material factual issues' under the Regulations and was denied a hearing that he seasonably requested. * * * *N.L.R.B.* v. *Joclin Mfg. Co.,* 314 F. 2d 627, 631–32 (2 Cir. 1963).

This withdrawal of due process from the proceeding was aggravated in the present case by the nature of the so-called sufficient hearing. The company is held to have forfeited its protestations of an unfair election because it failed to put on evidence to that effect

before the Examiner. It is small wonder that the company abstained. The Examiner had not even been directed by the Board to hear the employer. By telegram the company was merely given *"leave * * * to request* the Trial Examiner to *permit"* it to be heard. (Accent added.) Aside from this casualness of the Board toward the interest of the employer, the Examiner himself was so perplexed as to his authority and duties that he asked for argument from the parties as to what he should do.

True, finally he invited the employer to reiterate its objections and exceptions and to submit its evidence, but the Examiner was not sure of what *could* be done with it, even if it preponderated in favor of the company. Nothing could have been accomplished; the game was over before it began. Was it reasonable to expect the Examiner to reverse the Board? Yet the employer is cast in judgment for default in not pursuing this expectation.

I join in the result of the Court's opinion, but I regret it endorses the Board's procedure.

J. SPENCER BELL, *Circuit Judge,** dissenting: Once again my colleagues invade an area which I think is peculiarly within the expertise of the Board to overthrow a result they do not like. It is, I think, quibbling to use the two points they have chosen to find the Board clearly in error on the representation issue. The first is that the union misrepresented the fact that New York union contracts offered clinical services to the families of union members. There was no evidence that this representation in fact changed a vote, and certainly the Board is in better position to judge than this court which has only the opinion of company counsel to support its conclusion. The

* Judge Bell prepared this opinion before his death on March 19, 1967.

second is that the leaflet addressed to the company beginning *"In your New York union contracts"* misled the employees. The majority's opinion is speculation, and if I were going to speculate I would assume that after a long and bitter campaign, the employees would all know whether the company had in fact signed advantageous contracts with the union at other plants. Finally, the reversal of the Board with respect to the mechanics of the election is utterly without justification. There was not a scintilla of evidence that the persons excluded from voting were company adherents. If mistakes there were, the Board was justified in assuming they cut both ways. In *NLRB* v. *Jesse Jones Sausage Co.*, 309 F. 2d 664, 667 (4 Cir. 1962), this court said "* * * it is not for this court to exercise discretion as to 'whether or not the election should be set aside for irregularities in procedure.'"

United States Court of Appeals for the Fourth Circuit

No. 10552

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BATA SHOE COMPANY, INC., RESPONDENT; UNITED SHOE WORKERS OF AMERICA, AFL–CIO, INTERVENOR

On Petition for Enforcement of an Order of the National Labor Relations Board

This cause came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Bata Shoe Company, Inc., its officers, agents,

successors, and assigns, on the 18th day of February, 1966, in a proceeding before said Board known upon its records as Case No. 5–CA–3293; upon the answer of the Respondent, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said petition of the National Labor Relations Board be, and it is hereby, denied.

J. BRAXTON CRAVEN, JR.,
United States Circuit Judge.

Filed April 6, 1967, MAURICE S. DEAN, *Clerk.*

APPENDIX C

United States Court of Appeals
for the Fourth Circuit

No. 10159

GRAPHIC ARTS FINISHING CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review of an Order of the National Labor Relations Board.

Argued February 9, 1966—Decided June 19, 1967

Before BOREMAN, BRYAN AND J. SPENCER BELL,* Circuit Judges

BOREMAN, *Circuit Judge*: This is a petition by Graphic Arts Finishing Co., Inc. (hereafter the company), for review of a decision of the National Labor Relations Board (hereafter the Board) which held that the company had violated section 8(a)(5) of the National Labor Relations Act as amended. The Board's Decision and Order is reported at 153 NLRB No. 115.

The company, a Maryland corporation, is engaged in finishing printed material, and has its principal place of business in Baltimore. In September of 1964 the United Papermakers and Paperworkers, AFL–CIO (hereafter the union), engaged in an organiz-

*Judge Bell, a member of the panel, voted in conference for enforcement of the Board's order but died before the opinion was prepared.

ing campaign at the company plant. On September 22, 1964, the Board conducted a representation election at the company plant. There were ninety-one votes cast for the union and eighty-three against, with five challenged votes. The company filed objections with the Regional Director urging that the election was rendered invalid by reason of unfair conduct on the part of the union and should be set aside. The Regional Director, after an investigation but without a hearing, recommended that the company's objections be overruled and that the union be certified. The company filed objections with the Board and again requested a hearing. The Board, without a hearing, adopted the Regional Director's recommendations and certified the union as the bargaining representative of company employees. However, the company refused to bargain with the union, asserting that it would not do so until a federal court had reviewed the Board's certification. The union then filed an unfair labor practice charge based upon the company's refusal to bargain. The parties stipulated to waive a hearing before a Trial Examiner and the matter proceeded directly to the Board. The Board held that the company had violated section 8(a)(5) of the Act by refusing to bargain collectively with the union and ordered the company to cease and desist from such practice.

The company argues that the pre-election conduct and tactics of the union rendered the election unfair and interfered with the free choice of the employees. We consider and discuss here only one aspect of the challenged conduct which, in our opinion, requires that enforcement of the order under review be denied.[1]

[1] Among other company objections to the election were the following: coercion of employees and threats of violence on the part of union representatives and sympathizers; union violation

It is undisputed that twenty-four hours prior to the election the union issued two circulars which undertook to point out to the employees the many benefits which would follow unionization. One circular related to "wage rates and fringe benefits that are being paid under Union Contracts," and proceeded to list wage rates for various classifications, but the companies allegedly paying such rates were not identified. It was subsequently established that the rates and benefits were a composite of those paid under various contracts in a wide area extending from Philadelphia, Pennsylvania, to Washington, D.C., excluding the Baltimore area. A witness familiar with the wage rates and benefits existing in unionized binderies in the Baltimore area submitted a statement that none of the companies in that area was paying the rates and benefits listed in the circular.

The apprentice rate set forth in the leaflet was 10% or $.33 per hour higher than that actually paid even in the Washington area where a high apprentice rate did exist.

A second circular distributed at the same time discussed strike procedure and strike benefits. With respect to strike relief benefits the leaflet stated "$100,000 Dollars was paid out in strike relief to members and their families in the Chesapeake strike. NOT ONE PERSON LOST A THING." The strike referred to in the circular was a strike sanctioned and conducted by the same union at Chesapeake Paperboard Company, a Baltimore firm, from August 1962 to February 1963. The president of that company submitted a statement to the Regional Director in which

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of agreement not to challenge the votes of certain employes which agreement was a condition precedent to the company's consent to the election; the late start of the election which deterred employees from voting.

it was shown that his employees lost "approximately $600,000" in wages as a result of that strike. This strike was of great importance in the election which is challenged here because the same union was involved.

The Regional Director found that the circular contained such misstatements but that they were not sufficient to render the election invalid because their impact on the election was insubstantial. The misrepresentation as to apprentice rates was dismissed as insignificant because the company did not have an apprentice program and that trainees did not consider themselves apprentices. The Regional Director found no obligation on the part of the union to disclose that its information referred to a wholly different area. It concluded that the union was merely stating what it could do and "the fact that the prevailing unionized industry rates and benefits in Baltimore are less, does not mean it misrepresented or deceived the voters."

The Regional Director also dismissed the misstatement concerning the strike relief benefits paid at the Chesapeake Paperboard Plant because "this is the sort of language that employees can readily evaluate. It is unreasonable to suppose that employees would be misled by such statements into thinking that whether they strike or work, they will suffer no loss whatsoever. The facts of industrial life are too widespread. One can readily see through such exaggeration." These findings were adopted by the Board in its decision that the company had violated section 8(a)(5) of the Act; the Board merely referred to its earlier decision. With this decision we cannot agree.

The Board, in *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, formluated and announced the test to be applied in determining whether campaign liter-

ature containing misrepresentations could serve as a basis for invalidating an election. There the Board held that, in order to set aside an election, there must be (1) a misrepresentation of a material fact which is a substantial departure from the truth, (2) which is so timed as to prevent the other side from making an effective rebuttal, and (3) may reasonably be expected to have a significant impact on the election. *Id.* at 224.

In *N.L.R.B.* v. *Bonnie Enterprise, Inc.*, 341 F. 2d 712 (4 Cir. 1965), this court set aside an election because of union misrepresentation of facts contained in campaign literature. There the literature contained misrepresentations as to group life insurance, sick pay, vacations and coffee breaks. It was distributed on the day prior to the election and on election day. We held:

> It is clear that the promises contained in the circular went far beyond the bounds of permissible hyperbole sometimes indulged in during pre-election campaigns for public office. They were substantial misrepresentations of material facts of vital concern to employees voting in the election. In fact, it is difficult to conceive of more important misrepresentations. Furthermore, the timing of the publication afforded no opportunity for the interested parties to either verify the claims or to determine their untruthfulness. *Id.* at 714.

In *Celanese Corporation of America* v. *N.L.R.B.*,[2] it was held that misrepresentations as to fringe benefits were material to voting employees and would operate to set aside the election. The union had stated

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[2] 121 N.L.R.B. 303 (1958), *enforcement denied*, 279 F. 2d 204 (7 Cir. 1960), *vacated per curiam*, 365 U.S. 297 (1961), *enforcement denied*, 291 F. 2d 224 (7 Cir.), *cert. denied*, 368 U.S. 925 (1961).

that fringe benefits at other company plants had been won through collective bargaining. While the court found that a number of benefits at the company's other plant were effected through collective bargaining, the company had instituted some benefits on its own initiative. The union argument that it did not intend to create the impression that all the benefits were won through collective bargaining was rejected by the court which stated: "If the author had intended to speak of some or several benefits, he would necessarily have had to employ a limiting adjective." 279 F. 2d 206. The court, in a subsequent decision, pointed out that because of the union's special knowledge as to the facts and because the company was effectively prevented from replying to these misstatements the election would be set aside. 291 F. 2d 226. *Accord, N.L.R.B.* v. *Houston Chronicle Publishing Company,* 300 F. 2d 273 (5 Cir. 1962).

In the instant case there was no opportunity to reply to the union's misstatements and the election was close; a switch of only five votes would have resulted in a union defeat. The misrepresentations concerned subjects even more vital than those in *Bonnie Enterprises* because here they dealt, in part, with wages. A misrepresentation of $.33 an hour with respect to apprentices' wages represents $13.00 per week and more than $600.00 per year. It appears beyond question that such a figure is material and would significantly affect the free choice of the employees. See Bok, *Regulating NLRB Election Tactics,* 78 Harv. L. Rev. 38, 90 (1964). The Regional Director's attempt to explain that the company had no apprentice system ignores the fact that the company had twelve trainees. It is also clear that no union employees in the area were receiving all the rates and benefits listed in the literature. The union, in discuss-

ing such significant subjects was obligated to be much more precise. Wages are of paramount importance to employees as "they are the stuff of life for Unions and members, the selfsame subjects concerning which men organize and elect their representatives to bargain." *N.L.R.B.* v. *Houston Chronicle Publishing Company, supra,* 300 F. 2d at 280.

We conclude that the gross misrepresentation as to strike benefits paid to the union's members at another plant in the area and that not one person lost a thing during a recent strike was material and had a significant impact on the election. There was no equivocation here: the union statement concerning what it had paid other members and the effect of such payments was unqualifiedly false. The Regional Director's explanation that the workers could easily see through such a misstatement disregards the fact that this was a statement made by the union which paid the strike benefits, a fact which would seem to clothe the statement with unmistakable authenticity. If the employees believed this statement, made by the party in the best position to know the truth, any doubts they entertained about joining the union for fear of being involved in a costly strike would be substantially reduced, if not totally removed. It is common knowledge that strikes play a major role in labor relations and that they constitute the most potent weapon in the employees' arsenal. We reach the conclusion that such deliberate misrepresentations as to material facts, particularly the false statement that the payment by the union of strike relief funds save the strikers from all loss, made to employees who were faced with a difficult choice in an election decided by such a narrow margin, were timed so as to prevent the company from making an effective rebuttal, were reasonably expected to have a significant impact on the election and

prevented the employees from registering their free and untrammeled choice as to a bargaining representative. *N.L.R.B.* v. *Trinity Steel Co.*, 214 F. 2d 120, 123 (5 Cir. 1954).

We hold that the Board's order should be set aside and the company's petition for denial of enforcement should be granted.

Enforcement denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 456

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BATA SHOE COMPANY, INC. and UNITED SHOE WORKERS OF AMERICA, AFL-CIO

BRIEF OF RESPONDENT BATA SHOE COMPANY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Although the Petitioner makes it appear that the question presented is whether the court below applied the wrong standard of judicial review, such is not the case.

The court below refused to enforce the Board's order on two grounds:

1) The maladministration of the election by the Board.

2) Material misrepresentations in the Union's election eve literature.

With respect to the first ground, the court below found that the Board had "abused its discretion" in failing to set aside the election because of its maladministration of the election. The Petitioner admits that on this aspect of the case "abuse of discretion" is the proper standard for judicial review so the question presented is not whether the court below applied the wrong standard. Petitioner is merely contesting the court's conclusion on this point.

With respect to the second ground on which the court below refused to enforce the Board's order, Petitioner again states that the question presented is whether the court below applied the wrong standard of judicial review. Actually, the court applied the substantial evidence test to the factual questions presented and found that the Board erroneously failed to apply the Board's own standards in not setting aside the election because of material misrepresentations in the Union's election eve literature. Petitioner concedes that the substantial evidence test is the correct standard for review of questions of fact, but contends there were no factual questions for the court to determine.

The question which Petitioner presents, therefore, is not whether the court below applied the wrong standard of judicial review. Petitioner seeks to attack the reasonableness of the determination of the court below when the court applies correct standards of judicial review. Accordingly, it is submitted that the real question is:

Whether this Court should review the decision of a court of appeals which applied the correct standard for judicial review and where no other error is claimed?

Counterstatement of the Case

This litigation involves the validity of an election where a shift of three votes in a unit of 2,583 employees could alter the results.[1]

In its "Exceptions to the Regional Director's Report on Objections" to the representation election, the Company set out 23 incidents which it maintained individually necessitated setting aside the election and cumulatively "clearly compelled" this action (App. B, p. 24, fn. 3).[2] In these objections, the Company contended that the employees were subjected to repeated misrepresentations, several incidents of actual threats, restraint and violence, numerous acts of misconduct on the voting line and in the polling place and irregularities in the procedures followed in the conduct of the election (J.A. 169-172).

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[1] There were approximately 2,583 eligible voters and 2,159 ballots cast. 1,082 were cast for the Union, 1,036 were cast against the Union. There were 41 challenged ballots and 6 void ballots (J.A. 65). If the challenged ballots were added to the votes cast against the Union, there remains a narrow difference of 5 votes. Consequently, a shift of 3 votes could make the challenged ballots determinative and alter the results of this election. In the last representation election conducted in December, 1963, the Board found all those who had cast challenged ballots were eligible to vote and that all had voted against the Union (App. B, p. 41, fn. 18). (Appendix B when used herein refers to Petitioner's Appendix B.)

[2] Petitioner erroneously stated in its petition that "the court of appeals agreed with the Board that those objections were insufficient to invalidate the election" (Pet., p. 4, fn. 4). While it is true that the court below found no quarrel with reference to the Board's resolution of challenges to several isolated Union campaign leaflets, the court specifically concluded by stating "it is unnecessary to consider the remainder of the Company's objections to the election" (App. B, p. 43). Clearly, the court did not "agree with the Board that those objections were insufficient to invalidate the election," but on the contrary, withheld any determination on these objections in view of its decision to refuse enforcement of the Board order on the two grounds specified.

In order to obtain court review of the Board's decision under the procedures provided by the Statute, the Company refused to bargain with the Union pursuant to the Board's order.[3] The Board requested the court below to enforce its order.

The court of appeals denied enforcement of the Board's order on the basis of two of the objections raised by the Company.

First, the court found that the Board erred in not setting aside the election under its own standards where the leaflet distributed by the Union on the eve of the election, April 22, contained material misrepresentations of fact made by a party in an authoritative position to know the truth in circumstances which prevented an effective reply prior to the election (App. B, p. 40).

Second, the court found the Board abused its discretion in refusing to set aside the election where there were irregularities in the voting procedure caused by the substantial omissions of the Board agents responsible for the balloting (App. B, pp. 41-43).

Judge Bryan, concurring specially, stated:

> "Clearly, the Board's order should not be enforced, for the reasons, at the least, assigned in the Court's opinion." (App. B, p. 43).

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[3] Section 9(d) of the National Labor Relations Act, 29 USC, Sect. 159(d) provides that when a representation determination forms the basis of a Board unfair labor practice order and that order is before a court of appeals for review under Section 10(e) or (f) of the Act, the record in the representation case shall be filed in the court of appeals and the representation determination reviewed at that time. There has been no allegation or finding that the Company has engaged in any other unfair labor practice. "Moreover, no opprobrium attaches to an employer's refusal to bargain where, as here, the refusal is based upon the employer's desire to test the Board's . . . findings in an underlying representation proceeding." *Metropolitan Life Ins. Co.*, 156 NLRB 1408, 1410.

The Board's statement of the case requires amplification and correction.

The election agreement, a Stipulation for Certification upon Consent Election, entered into by the Company and the Union and approved by the Board's Regional Director, provided, not only, that an election was to be held on April 23, 1965 but also specified that the hours of the election were to be from "8:00 a.m. to 12:00 noon and 1:00 p.m. to 5:15 p.m." and these were the only hours publicized to eligible voters (J.A. 128).

Shortly before 5:15 p.m. on the day of the election, when according to the Stipulation for Certification upon Consent Election, the polls should close, the Board agent in charge caused an announcement to be made to employees over the public address system that "to be eligible", employees must be in the voting line by 5:15 p.m. (J.A. 113).

At about 5:16 p.m. the Board agent went to the end of the line of voters, which extended across the service road and down the side of the building opposite to the building which contained the voting booths (J.A. 113). An employee, Frank Chenoweth, who had in fact been on the voting line before 5:15 p.m. and had stepped off the line to enter a washroom, was seen by the Board agent when he tried to return to the line (J.A. 115). The Board agent in charge refused to accept Chenoweth's explanation and required Chenoweth to leave the line, holding that Chenoweth was "not eligible" because, in his opinion, he had not been on the line before 5:15 p.m. (J.A. 115).

The Board agent instructed the last three men in line that the line was closed and that if anyone attempted to get in line after them such persons should be directed to the polling place to consult with a Board agent (J.A. 113).

He, himself, did not remain at the end of the line, but returned to the polling place which was in the opposite building (J.A. 113).[4] Upon looking out the window, he observed several employees in line behind those designated as the end of the line (J.A. 113). He went back out and was advised by the three men at the end of the line that these employees had been waiting in the lobby of the building since 5:15 p.m. and were therefore "eligible" (J.A. 113). The Board agent permitted these men to remain in line and then, at about 5:20 p.m., went into the lobby of the building and observed eight to ten people who explained to him that they had been there since 5:15 p.m. The agent permitted them to get in line (J.A. 113-114).

Chenoweth got in line again and reached the polling place, but was denied the opportunity to cast even a challenged ballot by the Board agent (J.A. 115).

Although the Board agent had instructed the three men at the end of the line that the line was closed and if anyone attempted to get in line after them to refer them to a Board agent, they did not do so in all cases and more than thirty employees got on the end of the line which was outside the building after 5:15 p.m. (J.A. 113, 114).

Another employee got on line as late as 6:30 P.M. and voted without question (J.A. 114).[5]

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[4] Petitioner inaccurately claims that the Board agent could not remain at the end of the voting line because he had to be in the polling area (Pet., p. 6). No such finding was made. Actually, the Regional Director's report shows that there were three Board agents conducting the election (J.A. 107). In addition, there were three observers for each party, making a total of nine authorized personnel to conduct the election. No explanation has ever been given why a Board agent or authorized observer was not detailed to watch the end of the line.

[5] Petitioner reiterates the same argument made by the Board to the Fourth Circuit attempting to assign some of the delays in vot-

Union observer Helen Stout refused to vote at 1:00 p.m. when the Board agent suggested that eligible observers vote. At 6:55 p.m., after Chenoweth had been denied the right to vote even a challenged ballot, the Board agent permitted Helen Stout to cast her ballot (J.A. 116).

In the immediately previous election, which was held under identical conditions (except for the maladministration of the election which occurred in the instant election), 92% of the eligible employees voted. Only 83% of the eligible voters voted in the instant election. Or, stated another way, 418 voters did not vote in the instant election as contrasted with only 173 non-voters in the preceding election (J.A. 105).

On these facts, the court below felt that a fair and equal opportunity for all Company employees to vote was precluded by actions of the Board agent responsible for the election (App. B, p. 42). The court stated:

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ing to the Company contending that the eligibility list was not corrected to reflect transfers after the eligibility date (Pet., pp. 5-6, fn. 6)

The record showed that the Company prepared the eligibility list in accordance with the specific instructions of the Board agent (J.A. 166). The list was set up by departments and was made up in the same way as in previous elections and it proved adequate in those elections (J.A. 106, 166). Further, the list was submitted for inspection to the two Union organizers, the Union-in-plant committee and the Board agent on Wednesday, April 21, 1965 (J.A. 77, 166). This inspection lasted from 10:00 a.m. to 4:30 p.m. on that date (J.A. 77). The members of the Union-in-plant committee who were employed in the departments and were observers in the previous election (J.A. 82) were certainly in a position to know whether there had been transfers since the list was prepared and were in a better position than the Company to realize if such transfers would delay the voting. The eligibility list was, therefore, not the exclusive responsibility of the Company. With respect to the check of newly hired empoyees' eligibility status, the procedure followed is that required by the Board.

> "The present case is clearly one where 'the Board agents nodded' when they should have been alert and active. *Shoreline Enterprises, Inc.* v. *NLRB,* 262 F. 2d 933, 946 (5th Cir. 1959)" (App. B, pp. 41-42).

The court concluded that:

> "We agree with the company that the maladministration of the election made it highly probable that eligible employees were deterred from voting while at least thirty others were allowed to vote after the polls should have been closed. When considered along with the fact that Chenoweth was improperly prevented from voting, in view of the very close results, it is our opinion that the Board *abused its discretion* in refusing to set aside the election." (Citations omitted) (Emphasis added) (App. B, p. 43)

As additional grounds for refusing to enforce the Board's order the court below relied on the misrepresentations in the leaflet distributed by the Union on April 22, the eve of the election (App. B, p. 22). The leaflet is found in the Joint Appendix at pages 125c-125e.

The leaflet was specifically addressed to Mr. Dolezal, the president of the Company (J.A. 70, 130) and said:

> "WHY NOT BE FAIR AND GIVE THE WORKERS THE TRUE FACTS, MR. DOLEZAL
>
> *You* have been making many speeches about Union benefits in every department of the plant, but *you* have never produced one shred of evidence to prove what *you* say. When the worker asks to see the proof, *you* ask them to come to *your* office and *you* will show it to them—SO FAR NOTHING BUT SPEECHES. In *your* New York union contracts which *your* attorneys Seligman and Seligman participated for some of the shoe companies, the following benefits are in effect:" (Emphasis added) (J.A. 125c)

The Union then listed a comparison of the benefits at the plant here in question and those purportedly contained in its New York labor contracts among which was the following comparison:

"Union Benefits	Bata
Clinic—For all union members and dependents: Includes free diagnosis—free doctor—free drugs—free X-ray etc.	Bata has no such clinic and in fact punishes workers who are out sick."

Continuing, the leaflet reads:

> "Therefore, Mr. Dolezal, since your high priced attorneys, Seligman and Seligman, have these New York union agreements, why not be fair and show them to the Bata workers?" (Emphasis added) (J.A. 125(c))

Toward the end of the leaflet, after promising that the workers would not lose any current benefits if they voted for it, the Union stated: "Your Union will negotiate to add to these benefits!"

The court below pointed out that:

(1) The Board itself specifically found that *at least* one pertinent contract "did not reflect the benefits claimed by the Union in its leaflet" (App. B., p. 38).

(2) The most important "Union" health benefit listed was "Clinic—For all union members and dependents: Includes free diagnosis—free doctor—free drugs—free X-ray, etc." and the Board "ignored" the fact that free medical benefits of dependents in New York did not extend to clinical services (App. B., p. 38).

(3) The Regional Director's decision, which was adopted by the Board that the claimed clinic benefits was "sub-

stantially correct" relied erroneously on a clause from the agreement between Boro Medical Center and Union's New York Welfare plan dealing with surgical—not clinical—services. Another clause, in the same agreement, which was in evidence, specifically requires dependents to pay fifty percent of the regular fee for clinic diagnostic services (App. B., p. 39, fn. 15).

(4) The misrepresentations were made by a party in an authoritative position to know the truth (App. B., p. 40).

(5) The leaflet was distributed on the eve of the election which prevented an effective reply prior to the election (App. B., pp. 39-40).

The court also found that the leaflet contained additional misrepresentations because it conveyed to the employees the false impression that the Company had contracts with the Union in New York (App. B., pp. 39-40) which afford workers there substantially greater benefits than were enjoyed by the unorganized voters in this election.

The court pointed out that the Company's position that "your" is reasonably understood to refer to the Company's New York contracts is strengthened by the use in the preceding paragraph of the leaflet of *you* five times in addressing the Company president and *your* as a possessive pronoun in conjunction with *office* to refer to the president's office (App. B., p. 40, fn. 17). The court further stated that if it accepted the position of the Board that "your" was used in this context "by way of designating a class" then the language used implies that *all* New York contracts with the Union contain the listed benefits and the Board has found as a fact that this was not true. Therefore, even under the Board's theory there would be a material misrepresentation of fact (App. B., p. 40).

ARGUMENT

The suggestion that this case presents any issue which justifies a petition by the Government for a writ of certiorari is without foundation.

Petitioner does not argue that the decision of the court below is wrong in finding that the Board's determinations in this case were not supported by substantial evidence. The thrust of Petitioner's argument is that, in spite of the fact that the Board's determinations may be unsupported by substantial evidence, they may not be overruled by the court of appeals unless they are arbitrary, capricious or unreasonable. It is difficult to imagine when any such eventuality would ever take place.

This is certainly not the intent of the statute nor in keeping with this Court's admonition that lower courts "assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past . . . Congress has imposed on them responsibility for assuring that the Board keeps within reasonable bounds." *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490.

While the decisions of the Board in framing rules regarding the determination of the appropriate unit for bargaining and the mechanics of the election are entitled to certain deference, this does not mean that the evidentiary findings of the Board may not be reviewed under the substantial evidence standard and that a court of appeals may not draw conclusions from the factual determinations on review.

In all cases Board determinations may be set aside where they are arbitrary, capricious, unreasonable or not

in accordance with the law. Particularly where, as here, the Board's own conduct of the election is at issue, the review by the court of appeals should be given some latitude in examining the Board's determination.

No need for certiorari is shown where the decision of the court below may be sustained on the standards urged by the Petitioner, where there is no conflict of decision on this point among the circuits, and where the determination of the court of appeals is in accordance with the purposes of the statute and the dictates of this Court.

1. The court below applied the correct standards for review.

The court below applied the standards for review which Petitioner itself contends are correct and no amount of strained semantics can convert this case into one warranting review by this Court on certiorari.

(a) The maladministration of the election by the Board agents

As one of the grounds of its holding, the court below found that in refusing to set aside the election because of the maladministration of the election to which the Company had objected, the Board abused its discretion (App. B, p. 43). This is the precise issue which the Board requested the court of appeals to determine.

At the outset of its opinion the court of appeals stated "we approach the merits of this case fully" cognizant that Congress has entrusted the Labor Board "with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bar-

gaining representatives by employees." (App. B, pp. 32-33).

In the footnote to its opinion (App. B, p. 43, fn. 21) the court made it crystal clear that it recognized that it is "for the Board and it is not for this [c]ourt to exercise discretion as to 'whether or not the election should be set aside for irregularities in procedure'" (App. B., p. 43, fn. 21) and pointed to its own decisions upholding the Board when the Board exercised its discretion properly. Applying this standard, the court below found that the Board had "abused its discretion" in the case at bar.

Petitioner does not point to any standard for judicial review other than "abuse of discretion" used by the circuit court in reviewing the Board's order, but merely argues that the Board's refusal to set aside the election despite the maladministration of the election was "reasonable", or in other words that it had not abused its discretion. The Union-Intervenor completely ignores this determination of the court and does not discuss this aspect of the case at all in its brief.

It is obvious from an examination of the circuit court's opinion that it was concerned by the fact that the Regional Director and, in turn, the Board, never recognized that a material issue in this aspect of the case is the disparate treatment of employees in regard to their right to vote after the voting line was closed.

The record in this case demonstrates that a fair and equal opportunity to vote was not provided all employees.

Beginning with the period immediately preceding 5:15 p.m. and continuing thereafter, the Board agent gave confusing and contradictory instructions to the voters concerning their eligibility to vote if they were not on line at

5:15 p.m. The Board agent: (1) caused an announcement to be made over the public address system that "to be eligible", employees must be on the voting line by 5:15 p.m. (J.A. 113); (2) instructed three employees at the end of the line that the line was closed (J.A. 113); (3) at least twice refused to let an employee, Frank Chenoweth, vote and ordered him to leave the line because he believed Chenoweth was not on line at 5:15 p.m. (J.A. 115).

Then, in complete contradiction of these actions and of his own broadcast definition that "to be eligible" an employee must have been on line at 5:15 p.m., he permitted several other employees whom he had seen get on line after 5:15 p.m. to remain on line. At 5:20 p.m. he permitted eight to ten more people whom he found in the lobby to get on line and, because he did not take adequate precautions to guard the end of the line, at least 30 more people were permitted to get on line after 5:15 p.m. As late as 6:30 p.m. another employee got on line and voted without question (J.A. 114) and he permitted Helen Stout, the Union observer, to vote at 6:55 p.m. (J.A. 116).

That this disparate treatment must have discouraged eligible voters is evident from the fact that 418 eligible voters did not cast ballots (J.A. 105). When it is seen that only 83% of the eligible voters voted in the instant election as contrasted with a vote of 92% of the eligible voters in the immediately previous election (J.A. 105), it must be assumed that the Board agent's announcement and his other arrangements and activities tended to restrain a number of employees from attempting to vote after 5:15 p.m.[6] Yet, the ballots of more than 30 em-

[6] To assume, as did Judge Bell in his dissent, that election mistakes "cut both ways," is to assume that all elections would end in a tie, or that if some ballots were properly cast, it can be assumed that those not cast would be in the same ratio, an assumption that runs counter to the Board's responsibility to establish an election procedure which will give all eligible employees an opportunity to vote. See cases cited *infra* p. 15.

ployees who failed to heed the Board agent's instructions were counted. Either these 30 employees who were not on line at 5:15 p.m. were eligible voters (in which case those of the 418 employees who properly obeyed the Board agent's instructions and did not attempt to join the line after 5:15 p.m. were likewise eligible, but were deprived of their vote by the Board agent's actions) or else, the 30 employees were ineligible voters (in which case at least 30 ineligible ballots were commingled with the other ballots and materially affected the outcome of the election). In either case, all of the employees of the same class were not given equal treatment, some being deterred from voting while others were permitted to vote and the number of employees who were not accorded an equal opportunity was sufficient to alter the results of this election.

The Board has enunciated the principle that proper election procedure requires every reasonable precaution that a full opportunity to vote be given all those eligible. *G.H.R. Foundry Division, The Dayton Malleable Iron Company,* 123 NLRB 1707, *Star Baking Co.,* 119 NLRB 835, *Alterman-Big Apple, Inc.,* 116 NLRB 1078, *F. H. Vahlsing, Inc.,* 114 NLRB 1451, *Repcal Brass Manufacturing Company,* 109 NLRB 4.

Where not only the Board's rules and procedures are involved but also the Board's actions through its agents, the courts should have some latitude in determining when the Board has abused its discretion. This is particularly true where the maladministration of the election is sufficiently serious to violate the standards enunciated by the Board itself.

Petitioner states that the court set aside the election "on the basis of the Company's contentions that it was highly probable that eligible employees were deterred

from voting" and that "at least thirty others were allowed to vote" (Pet., p. 18).

This gives a misleading picture of the grounds on which the court's decision on this aspect of the case rested.

Not only did the court consider the confusing and contradictory instructions of the Board agent at the close of the voting in making its determination that the maladministration of the election made it highly probable that eligible employees were deterred from voting, while at least thirty others were allowed to vote when the polls should have been closed, but the court pointed to the fact that Chenowith was improperly prevented from voting and that the election results were very close (App. B, pp. 42-43). In addition, the court considered the long lines which formed soon after the polls opened necessitating releasing departments at a time later than designated on the posted schedule, the fact that first shift voters spent an hour on line before receiving a ballot and the fact that the rain and long lines deterred some others from voting (App. B, pp. 42-43, fn. 20).

It is apparent, therefore, that the court had substantial basis for determining that the Board had abused its discretion in refusing to set aside the election because of the irregularities in the election procedure.

(b) The material misrepresentations in the Union's election eve literature.

With respect to the second ground on which the court below refused to enforce the Board's order—the material misrepresentations in the Union's election eve literature—the court concluded that the fact findings of the Board made in connection with the certification were not based on substantial evidence (App. B, p. 41).

Petitioner argues that the ultimate determination for the Board in passing upon objections to an election "involves two elements: (1) ascertaining the facts and (2) making a judgment as to the probable effect of these facts upon the exercise of the employee's free choice." (Pet., p. 13). Petitioner concedes that "the first function frequently requires the Board to make factual findings upon such questions as what the union or the company told the employees, whether those statements were true, etc.—findings which properly are to be tested by the substantial evidence standard" (Pet. pp. 13-14).

But Petitioner contends that as to the second function the court must apply the arbitrary and capricious standard of review.

Petitioner's view of the role of a court of appeals is a strange one. Petitioner in effect contends that if the court finds that the Board erroneously failed to find a misrepresentation, when in fact, there is one, the court of appeals is incapable of determining whether the misrepresentation is material.[7]

Even under the limited scope of review urged by Petitioner, if there were questions of fact, then the appropriate standard for review is substantial evidence on the record as a whole.

Petitioner erroneously asserts that there was no dispute as to the facts (Pet., p. 14). On the contrary, there always had been a dispute as to whether the statements in the union's leaflet were true.

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[7] It should be noted that in the case at bar, the Board never found that the misrepresentations in the election eve literature were not material. The Board merely found that there were no misrepresentations.

The Regional Director, whose report was adopted by the Board, had rejected the company's objections regarding the falsity of the union's assertion that its New York contracts provided for free clinical benefits, holding that the clinical benefits listed were "substantially correct" (J.A. 73).[8]

The Company had demonstrated that the Union's claim that its contracts in New York provided free diagnostic clinic services for employees and dependents was untrue. The Company proved this statement false by submitting to the Board a copy of the agreement between the Board of Trustees of the Welfare Plan of Joint Council 13 and the Boro Medical Center, which is referred to herein as the Boro contract (J.A. 73).

Paragraph 8, page 4 of the Boro contract specifically requires that dependents pay 50% of the regular fee for clinic diagnostic services. The paragraph reads as follows:

> "The Center shall render comprehensive diagnostic services to a dependent or member of immediate family of an employee at a 50% reduction of its regular fee" (J.A. 142).

On the basis of these facts, the court below found that

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[8] In making this finding, the Regional Director erroneously relied on a provision in the Boro contract dealing with a surgical insurance schedule not with the diagnostic clinic services which were the subject of the Union leaflet (J.A. 73). The Board in its brief to the Fourth Circuit compounded the error by inaccurately stating "additional union benefits including free diagnostic services for members and dependents were reflected in the Geller contract under surgical expenses . . ." (Board's Brief, p. 12, fn. 8). Diagnostic clinic services coverage are not described in the Geller contract at all. Only the Boro contract deals with coverage for diagnostic clinic services and this contract concededly does not provide free diagnostic clinical services for dependents. ("Board's Brief" where used herein refers to Board's brief to Fourth Circuit.)

the Board had ignored the fact that free medical benefits for dependents in New York did not extend generally to clinic services (App. B, pp. 38-39).

Petitioner does not dispute the court's findings of fact in this respect and, indeed, concedes that the leaflet was inaccurate in stating that dependents received all clinical services free (Pet., p. 16). Petitioner, thus, inferentially admits that the findings of fact made by the Regional Director and adopted by the Board, upon which was based the ultimate determination that the election constituted a dependable expression of employees' free choice of a bargaining representative, was incorrect.

Petitioner argues that "the court in fact made its own independent judgment as to whether the misstatements in the leaflet were material (Pet., p. 15). The court of appeals did no such thing. The first person to make the finding that the aforementioned representations, if false, were material was the Regional Director whose report was adopted by the Board when he stated "the material issue is whether the benefits are provided for in any New York contract to which the petitioner is a party" (J.A. 74, fn. 7).

Moreover, the conclusion that this issue was material is supported by abundant authority in numerous decisions of the Board. See *Cleveland Trencher Company,* 130 NLRB 600; *Walgreen Co.,* 140 NLRB 1141; *Hollywood Ceramics Company, Inc.,* 140 NLRB 221; *Calidyne Company,* 117 NLRB 1026; *Reiss Associates, Inc.,* 116 NLRB 217; *The Gummed Products Company,* 112 NLRB 1092; *Kawneer Company,* 119 NLRB 1460; *U. S. Gypsum Company,* 130 NLRB 901.

Petitioner argues that the "record does not contain evidence dealing directly with the effect of the leaflet upon

the employees" (Pet., p. 14). The Board has adopted a formula for determining whether or not a misrepresentation affects the free choice of employees. The formula is alluded to in the petition (p. 15, fn.13). The formula itself is the Board's own measure of the effect of the leaflet upon the employees.

The court below applied this formula to the misrepresentations in the union's election eve literature and concluded: ". . . that the Labor Board erred in not setting aside the election under its own standards" (App. B., pp. 40-41).

Thus, the issue was not as to whether misrepresentations, if false, were material or had an impact on the employees. The Board's own rules and decisions as well as the court's decisions and common logic dictate that representations relating to pecuniary benefits are material and when made in a last minute appeal to voters by the party having special knowledge of the true facts will be given particular weight by the employees. Accordingly, the question for the court to determine was whether there were misrepresentations.

The court below was confronted with the same question in determining whether or not the leaflet substantially misrepresented to the employees that the company had contracts with the Union in New York.

The Union, by addressing its leaflet to Mr. Dolezal, the Company President and, at the beginning of the message referring to your New York union contracts, obviously sought to convey to the employees the false impression that the company had contracts with it in New York providing more advantageous provisions than existed in the instant plant.

The Board found that the leaflet contained no misrepresentation and subsequently suggested to the Fourth Circuit that the union did not use the possessive pronoun "your" as a possessive pronoun at all when referring to Mr. Dolezal and his New York contracts participated in by his attorneys.[9] Rather, the Board asked the court to believe that having personally addressed Mr. Dolezal as "you" five times in the preceding paragraphs and having used the word "you" as a possessive pronoun in referring to "your office", the union suddenly switched the meaning of the term in referring to "your New York union contracts" to a general sense "by way of designating a class or type" (Board's Brief, p. 11, fn. 6) and then, in the same sentence, switched the meaning back again to that of a possessive pronoun in referring to "your attorneys".

The court properly refused to believe that the union was engaging in such grammatical legerdemain and found that the leaflet falsely represented to the employees that the Company had contracts with the organized units in New York which afford workers there substantially greater benefits than enjoyed by Maryland employees. (App. B., pp. 40-41).

Thus, an examination of the record reveals that the Board's factual findings on which it made its ultimate determination were erroneous. It relied on the wrong

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[9] Petitioner argues that the language "for some of the shoe companies" in the fourth sentence of the leaflet would correct the false impression that the union had contracts with organized units of the Company in New York containing more advantageous provisions than existed at the Maryland plant. (Pet., p. 16). This interpretation was not urged by the Board in its brief to the Fourth Circuit, nor referred to in its argument. Moreover, an examination of the leaflet demonstrates that the phrase "for some of the shoe companies" was merely designed to show that the attorneys did not participate in all of the New York contracts, and cannot be strained to read as correcting the union's false inferences throughout the leaflet that the Company had contracts with the Union in New York.

contract and the wrong contract provision to find that the Union's claimed health benefits were "substantially correct." Its reading of the union letter to find that the leaflet did not refer to purported Bata contracts in New York was obviously distorted, misconstrues its wording and overlooks the obvious purpose of the Union in using the deceptive phraseology.

In its Twenty Ninth Annual Report, the Board reports the action of the Fourth Circuit in *Singer Sewing Machine Co.* v. *NLRB*, 329 F. 2d 200. The Board stated "[i]n the court's view * * * the Board's determination of the appropriateness of the unit petitioned for by the union was supported by substantial evidence and, therefore, neither arbitrary nor capricious." (See pp. 114-115 of the Twenty-Ninth Annual Report of the National Labor Relations Board).

If credence is given to the Board commentary in *Singer*, then conceivably, the court below in the instant case could have determined that the Board's action was arbitrary and capricious because it was unsupported by substantial evidence.

The correct standard for judicial review to be applied in this type of proceeding has been specified by Congress and interpreted by this Court on numerous occasions. In the instant case, whether there has been a misrepresentation and, ultimately, whether any such misrepresentation is material, are both determinations of fact which must be supported by substantial evidence.

Moreover, Congress never intended that circuit court review of Board decisions in certification proceedings which have become the basis of a final order to bargain in an unfair labor practice proceeding should be limited as proposed by Petitioner.

This Court, in *Boire* v. *Greyhound Corporation*, 376 U.S. 473, 478 fn. 5, quoted from the House Report which described the standard for review to be used by courts of appeals in such cases:

> "Section 9(d) of the Bill provides an exclusive, complete and adequate remedy whenever an order of the Board made pursuant to Section 10(c) is based in whole or in part upon facts certified following an election or other investigation pursuant to Section 9(c). * * *
>
> * * * *
>
> Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to Section 10(e) or (f), *the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under Section 10(b) and 10(c).* H. R. Rep. No. 972, 74th Cong. 1st Sess. 20" (Emphasis Supplied)

Acceptance of Petitioner's thesis would create a limitation upon the authority of the courts of appeal in Section 10(e) and (f) proceedings which does not appear in the text of those subsections nor is suggested in any way by the opinion of this Court in the leading case, *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474. See also *Leedom* v. *Kyne*, 358 U.S. 184.

The cases cited by Petitioner in support of its position are inapposite. In *N.L.R.B.* v. *A.J. Tower Co.*, 329 U.S. 324, the sole question for determination was the reasonableness of a procedural rule—the refusal by the Board to accept a post-election challenge to a ballot—a step in the mechanics of the election, and did not deal with objections to the conduct affecting the result of the election. At page 335, this Court stated it was resting its decision *solely* on

the propriety of the Board's policy against post-election challenges. The Court did not hold that the circuit court could not as a matter of practice review the Board's policy. It merely agreed that the Board's procedure in this particular situation was reasonable.

In *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485, this Court recognized that the determination of the appropriate unit for bargaining involves a large measure of informed discretion. However, the substantial evidence test was still applied as the appropriate standard of review. In this regard, this Court emphasized that Section 9(b) of the Act specifically confers upon the Board a broad discretion to determine appropriate units. The Act contains no such provision in Section 10(e) pertaining to the Board's fact-finding powers in objection proceedings.

In *NLRB* v. *Hearst Publications*, 322 U.S. 111, this Court reviewed the denial of enforcement by a court of appeals of a Board order based on a finding that certain newsboys were "employees" within the meaning of the Act. This Court reversed the case, holding that in the "[s]pecific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." (at p. 130).

In *N.L.R.B.* v. *Waterman Steamship Co.*, 309 U. S. 206, this Court merely affirmed the propriety of the action of the Board deferring action on an election petition filed by one union until the company ceased its discriminatory practices against a rival union.

The case of *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123 is distinguished by its concern solely with the mechanics of an election. It did not deal with the truth

or falsity of the union's election eve literature, as Petitioner appears to imply (App. B., p. 17). In Mattison the court said the "notices of election contained a minor and unconfusing mistake in the employer's corporate name." The court of appeals had denied enforcement because the corporate name had been stated as Mattison Machine Manufacturing Company, rather than Mattison Machine Works.

It was in light of the *Mattison* opinion that this Court instructed the Seventh Circuit to reconsider its original opinion in *Celanese Corp.* v. *N.L.R.B.*, 279 F.2d 204, *cert. granted, remanded,* 365 U.S. 297, *enforcement denied,* 291 F.2d 224, *cert. denied,* 368 U.S. 925. On remand, the Court of Appeals held that *Mattison* was totally distinguishable, and this Court denied certiorari.

2. No question of importance is presented

This case does not present the important question Petitioner has elicited from it, as the decision of the court below is warranted even under the limited standard of review which Petitioner contends is appropriate.

Moreover, even if Petitioner's contentions are valid, that the decision of the court below may be sustained only if the standard for review used by the Seventh Circuit in the *Celanese* case *supra* is proper, it offers no basis for certiorari. In the case at bar, Petitioner urges that in spite of the fact that in the *Celanese* case, this Court refused to grant certiorari to review the standard of review used by the Seventh Circuit, it would now be appropriate to review it.

Significantly, the Petitioner does not contend that the dire consequences it predicts have materialized in the six years since the *Celanese* decision. The mere listing of

remote hypothetical possibilities which have not materialized in the past and for which no new basis is offered to infer that such eventualities will occur in the future, does not make an important question.

Petitioner does not assert that there is is a conflict of decision among the circuits on this issue. Indeed, Petitioner points to the fact that the standard of review which it contends was applied here is the same as that applied in a number of cases in the court below and by other courts of appeal (Pet., p. 12).

What are the dire consequences that Petitioner fears? That the Board's case load will increase because more companies and more unions will utilize the Board's established procedure to object to elections which do not reflect the free and uninhibited wishes of the employees, secure in the knowledge that a court of appeals will follow the dictates of this Court in *Universal Camera, supra,* to "assume more responsibility for the reasonableness and fairness of the Labor Board decisions. . . ."

Rather than giving cause for condemnation, this assures the results which the statute was designed to accomplish.

The purpose of a Board election is not, as Petitioner and the Union-Intervenor would have us believe, to assure the designation of a union as an employee's bargaining representative, but rather, as the Board correctly points out in *Hollywood Ceramics, supra,* "to assure the employees full and complete freedom of choice in selecting a bargaining representative" (at p. 233).

Clearly, as long as the true purposes of the law are being attained through an application of the law passed by Congress as interpreted by this Court, as well as numerous courts of appeals, an important question warranting review by this Court has not been raised.

The Union's Memorandum

In its Memorandum, the Union-Intervenor relates certain incomplete data, never a part of the record or pertinent thereto, as background, in an attempt to create the impression of union animus and hostility on the part of the Company. The fact is that in the more than ten years during which the Union has attempted to organize the Bata employees, the Company has not committed a single unfair labor practice. Far from showing union animus on the part of the Company, the "background" regarding previous elections establishes repeated, clear and unequivocal rejections of the Union by the employees in valid elections, the results of which were accepted as the unfettered choice of the employees.

In addition, the Union has chosen to devote the greater portion of its Memorandum to matters which are totally devoid of any relationship to the merits of the question presented to this Court. In the process, it has injected irrelevant and prejudicial hearsay into the dialogue.

The primary thrust of the Memorandum has been directed to the procedural question which was resolved by the court below in a manner favorable to both the Board and the Union and, accordingly, has no bearing on any issue properly before this Court. The Company did not raise any question regarding a denial of due process attributable to the failure to grant a hearing in its brief in the court of appeals and did not argue the matter of its own initiative. The Company has at all times taken the position that the facts of this case relative to the propaganda and conduct of the election clearly preclude the enforcement of the Board's order. Despite the fact that the Company chose to rely on the clear errors of the Board in the conduct of the elections and its judgment of

the campaign literature, Judge Bryan felt strongly that the inadequacies involved in the Board's hearing procedures were of sufficient merit to warrant setting the election aside on that basis alone.

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 456

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BATA SHOE COMPANY, INC., and UNITED SHOE WORKERS OF AMERICA, AFL-CIO

UNION'S MEMORANDUM JOINING IN THE NATIONAL LABOR RELATIONS BOARD'S PETITION FOR CERTIORARI.

i. *Statement.* Bata Shoe Company, one of the largest shoe manufacturing concerns in the United States, is conspicuous among the remaining non-union shoe producers in the nation. The Company's adamant opposition to unionization reaches back to the earliest years under the Wagner Act. It is highlighted more recently by the fact that in the last decade six massive election campaigns were required at Bata before the Union was able in 1965 to overcome the bitterly hostile Company propaganda and achieve formal approval by a majority of the workers.

The first United Shoe Workers petition for representation of Bata Company employees went to a Labor Board election on June 24, 1955, and resulted in a vote of 421 for the Union and 634 against. The Union promptly filed ob-

jections to the Company's illegal interference with the workers' free choice in the election. The Union's objections were upheld by the Labor Board (*Bata Shoe Company, Inc.*, 116 NLRB 1239), causing a re-run of the election on October 2, 1956, wherein the vote once more went against the Union. Another representation election at the instance of the Union was held on April 25, 1958, resulting in a third defeat for the Union. A fourth Board election was held on March 17, 1961, wherein the United Rubber Workers also sought recognition and the balloting failed to produce a majority vote for either union. A fifth election was held on December 19, 1963, resulting in 1,043 votes for the United Shoe Workers, 1,030 against, with 18 challenged ballots. When the Board ruled in 1964 that the 18 challenged employees were eligible to vote, their ballots were counted and the Union lost the election by a five-vote margin.

The sixth Bata election—the one at bar—was held on April 23, 1965. A majority vote having been cast for the United Shoe Workers of America, AFL-CIO, the Board on August 25, 1965 certified the Union as the collective bargaining representative of the workers. The Company, however, after first stating that it was ready to sit down with the Union to bargain a contract,[1] then turned around and declined to bargain with the Union and thus prompted the filing of the unfair labor practice charge under Section 8(a)(5) of the Act which resulted in this litigation.

On October 1, 1965 the Board's General Counsel issued a Complaint against the Company for its refusal to bargain. The Company's Answer admitted its failure to bargain; but

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[1] "The Bata Shoe Company will sit down at the bargaining table with the United Shoeworkers of America to draw up a contract 'some time in the next week or so,' a company spokesman said yesterday.

Frank Novak, personnel director of the Belcamp plant, said that company lawyers would handle negotiations with the union . . ." THE AEGIS (Bel Air, Md.), Sept. 9, 1965, p. 1.

in defense thereof it challenged the Union's certification by the Board, alleging that the Board had erred in finding the election in April of 1965 a valid expression of the desire of the majority of Bata workers to be represented by the United Shoe Workers. When the case came on for a formal adjudicatory hearing before a Trial Examiner of the Board on November 4, 1965, the Company had its opportunity to prove its objections; but after the Company outlined the evidence it was going to produce to prove its pleaded objections to the election and Board certification, it then suddenly and without explanation, declined to go forward with its proffered evidence (see Pet., pp. 26-27). In its case to the Trial Examiner the Company offered but a single witness—its own counsel—on a minor question as to what had been contained in the formal record before the Labor Board in the prior certification proceeding. Thereafter, the Company rested without introducing any evidence in support of its objections to the Board election and certification. The Trial Examiner and the Board thereupon upheld the election and found illegal Company refusal to bargain with the duly certified representative of its employees.

In the review proceedings in the court below the Union was granted intervention. In its brief to the court, the Union argued that the Company's deliberate choice to withhold its proof in the Board hearing on its election objection was an abandonment and waiver of those objections. The court below overruled that Union contention (see Pet., p. 31). In addition, it reversed the Labor Board's considered judgment that the election on April 23, 1965—wherein the Union won a majority of votes cast by about 90% of the employees—was a fair expression of the employees' uncoerced desire for United Shoe Workers representation.

The court below finds fault with the conduct of the elec-

tion by the Labor Board, although the Company when given an opportunity to litigate that issue before the Board declined to do so. The court also overrules the Board's judgment that a minor inaccuracy in one of the numerous campaign leaflets distributed by the Union did not prejudice the employees' votes in the ballot box. That the several facts stated in this campaign leaflet are substantially correct is not denied by the court below; but it finds fatal the single inaccuracy that under union contracts in New York free medical benefits obtain "for all Union members and dependents", whereas in fact they are free for members but "clinic diagnostic services" are partially contributory for dependents (Pet., p. 39, n. 15). Thus, contrary to the Labor Board's judgment, the court opines that some employees who voted for the Union would not have done so had they known that under certain union contracts in another state employees' dependents, while receiving free hospital and surgical benefits, pay 50 percent of clinic services.

ii. *Reasons for Granting the Writ.* It would be redundant for us to repeat the demonstration in the Labor Board's Petition for Certiorari that review is required in the present case, particularly in view of the emphatic dissenting opinion of Judge Bell (Pet., pp. 48-49). That posthumously published dissent chastises the majority for preferring judicial predilections to the expert judgment of the Board, which judgment Congress subjected to judicial reversal only in case of clear error.[2] Even through the opaque phraseology

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[2] See, generally, Jaffe, *Judicial Review*, 69 Harv. L. Rev. 1020, and cases cited in the Board's Petition for Certiorari, p. 12. And it should be noted that whether the *"substantial evidence"* or the *"reasonable basis in law"* test is applied, the Board's determination in the present case clearly must stand. For it is manifest that the Board not only had persuasive grounds for denying the Company's objections but it is the circuit court's ruling which is wholly arbitrary in imposing unprecedented perfection requirements upon the conduct of campaigns and elections.

of judicial decorum one discerns the depth of Judge Bell's concern about his colleagues' expansion of their review powers. "Once again," says the dissenting opinion, the majority judges "invade" the area of administrative expertise "to overthrow a result they do not like." It is, said Judge Bell, "quibbling to use the two points they have chosen to find the Board clearly in error . . ."

This Court has frequently found it necessary to review and reverse Courts of Appeals for invading the statutory authority and expertise of the Labor Board. See, e.g., *NLRB* v. *Mattison Machine Works*, 365 U.S. 123; *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324; *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404. Once again this Court is called on to correct and caution a lower court inclined to substitute its views on labor relations policy for the considered and experienced judgment of the National Labor Relations Board. And corrective review is particularly called for here because this case touches on the sensitive free speech area Congress expressly preserved from regulatory intrusion in Section 8(c) of Taft-Hartley. Here the Board has respected that limitation, but a reviewing court has undertaken to censor election literature in a way which both the First Amendment and the statute forbid.

To make every union and employer the insurer of its campaign statements' absolute accuracy, as does the court below, would substitute the rigors of governmental censorship for the freedom of speech and persuasion which have characterized elections throughout our political history. Perhaps some argument could be made in favor of imposing on the participants' campaigns in Labor Board elections an absolute accuracy requirement. But until the Congress or the Labor Board approves so radical a departure from our constitutional tradition, immaterial inaccuracy in a

single campaign leaflet is no ground for a circuit court to cancel a union's hard-won victory in a Board-supervised representation election.

Respectfully submitted,

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